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FEDERAL JUDICIAL COMPENSATION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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FEDERAL JUDICIAL COMPENSATION

THURSDAY, APRIL 19, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Berman (Chairman of the Subcommittee) presiding.

Present: Representatives Berman, Conyers, Lofgren, Watt, Jackson Lee, Cohen, Schiff, Coble, Smith, Goodlatte, Keller, Issa, and Pence.

Staff present: Perry Apelbaum, Majority Staff Director and Chief Counsel; Julia Massimino, Majority Counsel; Joseph Gibson, Minority Chief Counsel; Blaine Merritt, Minority Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. BERMAN. The hearing of the Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

I would like to begin by welcoming everyone to this oversight hearing on Federal judicial compensation and to welcome our distinguished witnesses.

The Chairman of the full Committee has joined us. And I recognize Chairman Conyers for the first opening statement.

Mr. CONYERS. Thank you very much, Subcommittee Chairman Berman, Members of the Committee.

And to our two distinguished witnesses, members of the Supreme Court, we are so delighted that you are here.

And I want to begin by immediately immersing ourselves in the subject. What is linkage anyway? And why do we need to do something about it?

And I am referring to the authority that Congress gave itself by enacting section 140 of Public Law 97–92 in 1981, which established that the salary of Article III judges is prohibited from being increased without a specific congressional authorization each year. Unfortunately, I was in the Congress at that time. I did not remember how I voted on the issue.

But I take some responsibility for urging the 110th Congress to correct this at once. There is no existing logic for linkage anymore in the 21st century, as far as I am concerned.

I think it will help all of us. And I see no reason why we need to require that the cost-of-living increase happen only because we give it to you every year. I think if a cost-of-living adjustment is appropriate, it should happen anyway.

Now, if there is any single idea in the Constitution that has separated our experiment in democracy from all other nations, it is the concept of an independent judiciary. I had the pleasure of meeting with some of the members of the court. And I have since come from China. And we met with Chinese judges who are grappling with this really radical idea of a presumption of innocence. And they were telling us the problems they were having in effecting that.

And so, what we are doing and what other countries in the world are doing—they are all looking at the American constitutional experiment. Alexander Hamilton said that the independent spirit of judges enabled them to stand against the ill humors of passing political majorities. And in the Massachusetts Constitution, I remind you that it said that it is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.

And so, we are proud in this Committee and in this Congress that the civil rights progress in America came from striking down racially restrictive covenants in Shelley and Kramer in 1948; that we prohibited racially segregation in the public schools in *Brown v. the Board* in 1954; that we took the courageous act of Rosa Parks' bravery in the Montgomery bus boycott to end racial segregation of interstate and intrastate transportation facilities in *Bailey v. Patterson*; in criminal law, Gideon and Wainwright in 1963 provided that criminal defense attorneys must be provided for indigent criminal defendants, in 1964, the famous Miranda decision, and so on.

These cases all have been landmark, and they were done by that third branch of government because it was highly unlikely, looking back historically, that this could have happened any other way. I am very pleased about this.

The role of the Federal courts in matters of speech, of religion, of freedom of the press, due process, equal protections, voting rights, reproductive choice, privacy, and curbing executive abuses is important in every way, and it intersects everybody's lives in many ways—the decisions that are made by the distinguished members of the United States Supreme Court.

Now, I have given you a list of the things that have made me proud. I have got an equally long list of the things that I am not too happy to report. And so, I have struck them from my statement this morning because that is not why we are here.

I do fervently believe, as every Member on this Committee does, that our judicial system in its conception,its process and personnel, is the envy of the world. And so, for these reasons, we take serious the issue of the compensation of members of the Supreme Court and of our failure, admittedly, to adequately compensate the members, the Justices on the Court. And so, we are now looking at the results of a decline in incomes of pay that have led to widespread resignations, unfortunately, from the judiciary over this last period of years.

Equally troubling is the implications this reduced pay has had for the diversity on our Federal bench. One of the strengths of the court, especially the Federal courts in particular, is the pluralism in terms of race, religion, and career expertise. If we don't eliminate linkage and increase Federal judicial pay, I fear that we will

be limiting our judiciary to persons of more privileged backgrounds. And I don't think that would advantage us in any way.

So as we meet today, the stakes could hardly be higher. We all want an independent judiciary. We want the best and most qualified individuals that make these life and death historical decisions that must be made every day in our Federal judiciary. We want to maintain this crown jewel of our constitutional system. And we have to be willing to pay for it.

And I am very proud of the Chairman of this Subcommittee, Howard Berman, and the great work that he has done in leading us to this day. Thank you very much.

Mr. BERMAN. Well, thank you, Mr. Chairman.

And I now recognize our distinguished Ranking minority Member of the Subcommittee, Congressman Coble, for his opening statement.

Mr. COBLE. Thank you, Chairman Berman. And thank you for having called this hearing.

I guess every Member of this panel would place Chairman Berman and me at opposite ends of the ideological spectrum, I being the conservative, he the liberal. But Chairman Berman and I agree far more often than we disagree. And the rare times that we have disagreed has been done so agreeably.

And I suspect, Chairman Berman, the same comparison would apply to our two distinguished justices. I hope you all get along as well as Chairman Berman and I do. But that is not for me to say.

I will be mildly in opposition to the Chairman's position here. But I will do so agreeably. When I practiced law, which, see, is back in the Dark Ages now in North Carolina in the U.S. District Court for the middle district of North Carolina, I encountered outstanding judges, both at the State level and at the Federal level who performed exemplary public service that is integral to the maintenance of a free and civil society.

Gentlemen and friends in the hearing room, without the law and without good judges to administer this law, we likely would have chaos.

But none of us gets a blank check in life, Mr. Chairman, and especially in public life when we are, in effect, spending taxpayers' dollars. Pay raises and pensions resonate with the public.

Unlike a $1 billion appropriations bill, Justice Alito and Justice Breyer, an annual dollar figure pegged to a civil servant's salary or pension pegged to us and pegged to you all creates a digestible reference point for the average worker. The current salaries of the justices, U.S. district judges, U.S. circuit judges, and the justices across the street place them, I am told, in the top 2 percent of all salaried workers in the United States, irrespective of occupation.

Again, we are all aware of the important contributions that Federal judges and justices make to society. But consider the following inducements to Federal judicial service: intellectually stimulating and varied work; support staff, including very bright, sharp clerks to assist with the research and writing projects.

And I am not saying this in any sort of demeaning way, but there are tangible benefits, it seems to me. The opportunity to travel, as we enjoy as well; access to a menu of Federal benefits, including a pension that is equivalent, I think, to a judge's pay; and, of

course, prestige within the legal community in the judge's home town.

And, Mr. Chairman, I do this somewhat reluctantly because each time I have addressed the Judicial Conference, they have embraced me very warmly. And I hope they will embrace me warmly if I am ever invited to come back to talk to the Judicial Conference.

But, gentlemen, it is good to have both of you here.

And, Mr. Chairman, Chairman Berman, even though it may not sound like it, I pledge to you to keep an open mind as we debate this issue of judicial pay at this hearing and even subsequently. And I yield back the balance of my time.

Mr. BERMAN. Well, thank you very much, Mr. Coble. And I pledge to consult you whenever I have a question about rule of law in the Dark Ages. [Laughter.]

Mr. COBLE. See what I mean? We get along well. [Laughter.]

Mr. BERMAN. I recognize myself now for a very brief opening statement, and my entire statement will be in the record.

I simply want to point out that for the last few decades the Chief Justice of the Supreme Court has produced an Annual Report on the state of the Federal judiciary and issues facing those serving on the Federal bench.

This year Chief Justice Roberts' report focused on a sole subject: judicial compensation. He was not the first chief justice to express frustration about inaction on judicial compensation and the impact that lagging salaries have had on both the diversity and the independence of the Federal judiciary.

Chief Justice Rehnquist warned of that growing disparity. The framers of our Constitution understood the relationship between adequate compensation and judicial independence. It is simply this: I may not agree personally with an opinion issued by the Court, much as the Chairman pointed out—would like some, don't like others.

But as a Member of the legislative branch, I should not be and shall not allow myself to be permitted to translate that disagreement into a personal financial punishment for the justices joining the opinion. That protection is the objective of the Compensation Clause in section 1 of article 3 of the Constitution. I will spare you Alexander Hamilton's quotations on the economic pressures of inflation.

I will close by simply pointing out that just this morning a bipartisan group of former Members of Congress, including a former Chairman of the House Judiciary Committee, called for de-linkage of legislative and judicial branch salaries and supporting their efforts, the Brookings Institute, together with the American Enterprise Institute, released a report that analyzes the policy of interbranch salary linkage. The group includes former Senators Howard Baker, John Danforth, and Sam Nunn, former Representatives Dick Gephardt, Henry Hyde, Susan Molinari, Leon Panetta, and Louis Stokes.

I am told that the white paper lays bare the weaknesses and claims we hear about why to retain linkage and explains why a one-size-fits-all salary determination is inappropriate for officials with different responsibilities and career anticipations. The report also demonstrates the flaws in about the only defense offered for

a linkage as policy, that it symbolizes equality between the three branches.

Finally, I am told that the report addresses the question that is, to be honest, a concern of some Members of Congress who support linkage, whether it really has benefited legislative salaries. Time will tell exactly how we translate the results of this hearing and this report into legislation. But at this particular point, I yield back my time.

I point out that there will be votes shortly after 11:00 a.m. I am going to recognize the Ranking Member of the full Committee and then the co-Chair of the Congressional Caucus on the Judicial Branch for opening statements. And then we will get to the justices.

I recognize Congressman Smith.

Mr. SMITH. Thank you, Mr. Chairman.

At the outset, I want to thank our distinguished witnesses. It is not often that two Supreme Court justices choose to appear before Congress to testify and answer questions. Their presence indicates just how important this issue is to the Federal judiciary.

Without question, the Federal judiciary can demonstrate that their salaries have not kept pace with those of their peers in the private sector or with the typical working man or woman. Between 1969 and 2007, the real pay of district judges declined by 27 percent while the typical worker's pay increased by 23 percent. The primary reason judicial pay has lagged for nearly 40 years is linkage, the statutory requirement that links the salaries of district judges and Members of Congress.

But not all public servants are treated this way. That is deprived of higher pay by an arbitrary link to congressional compensation. For example, the FDIC's chief officer is paid more than $257,000 annually while the SEC's deputy chief accountant earns in excess of $200,000. In fact, a single day's listing of Federal job vacancies on March 14 showed 467 positions with pay ranges that exceed the current level for district judges and Members of Congress.

The erosion of judicial compensation based on linkage has compelled the chief justice of the United States to declare a pay raise his top priority. In my opinion, his comments and those of our guests today are due great deference.

If we want to continue to attract those with the broadest experience and greatest knowledge to the Federal judiciary, we simply have to pay them more. That is not a comment on their motives. It is a recognition of reality and the marketplace.

However, I also believe that an increase in Federal judicial pay while not linked to congressional salaries should be a part of other judicial reforms. For example, last year a committee led by Justice Breyer released its study of the Federal misconduct statute that found roughly 30 percent of all high profile disciplinary cases were mishandled. The committee also made 12 recommendations to ensure that the misconduct statute will be used to maximum benefit in future cases.

While I understand the judiciary's commitment to implement all 12 recommendations, we are informed that a plan to do so will not be available until the fall of 2007, meaning the Judicial Conference will have taken an entire calendar year just to develop a blueprint

with no implementation in sight. It might help efforts to raise judicial pay if better progress can be shown in this effort.

I also think it is fair to examine judicial pensions. The average age for district and circuit judges when they take the bench is about 50. After serving for only 15 years, they will fully vest in a pension program that equals their full-time pay. This system is generous by any standard and may even serve as an inducement to retirement or taking senior status. Increasing judicial salaries while modifying the judicial pension system might be a way to both attract and retain highly qualified judges.

Again, Mr. Chairman, I want to thank Justice Breyer and Justice Alito for taking the unusual step of testifying at a congressional hearing. It rightfully calls our attention to a very important issue.

Now I yield back the balance of my time.

Mr. BERMAN. Thank you.

And I recognize again the co-Chair of the Congressional Caucus on the Judicial Branch for an opening statement and then recognize the witnesses. Congressman Schiff?

Mr. SCHIFF. Thank you, Mr. Chairman.

And I want to thank the Chairman of our full Committee, Mr. Conyers, for hosting and holding this important hearing today. And indeed, we are honored to have two distinguished members of the Court with us.

At the outset, I just wanted to make reference to our Ranking Member, Mr. Coble's comments. And I am sure if you do visit the Judicial Conference you will be warmly received. But if you get kissed on both cheeks, it may not be as good as you think it is.

In the 108th Congress, along with Representative Judy Biggert, I co-established the bipartisan Congressional Caucus on the Judicial Branch in order to try to improve relations between our respective branches. Last year we hosted Chief Justice Roberts for a meeting with over 40 Members of Congress on both sides of the aisle. And Justice Breyer has graciously agreed to meet with our caucus in the near future.

The chief justice's message to our Members at the meeting last year focused on the current inequity in our compensation system for Federal judges, an issue that he believes poses a serious threat to the quality of our Federal judiciary. The late Chief Justice William Rehnquist, who was our first guest at the Caucus on the Judicial Branch, also frequently stated that inadequate compensation seriously compromises the judicial independence fostered by life tenure and risks affecting judicial performance.

Indeed, the founders understood well the potentially dangerous relationship between salary decisions and judicial independence with article 3, section 1 of the Constitution, specifically prohibiting the reduction of compensation for Federal judges. Holding these salaries hostage is equally problematic.

Chief Justice Roberts recently warned that if these inequities are not resolved, "The judiciary will over time cease to be made up of a diverse group of the Nation's very best lawyers. Instead it will come to be staffed by a combination of independently wealthy and those following a career path before becoming a judge different from the practicing bar at large."

In fact, the chief justice joked at our meeting that while his clerks were indeed brilliant men and women, he did not believe they were sufficiently worthy of the significantly higher salaries they would receive upon completion of their clerkships. And I know our present justices wouldn't agree with that sentiment, at least not on the record.

Last year I joined Senator Feinstein in introducing bipartisan legislation in the House to de-couple our salaries from the judicial salaries, to increase salaries and also to provide annual cost-of-living adjustments. We had 17 bipartisan co-sponsors, including our Committee's own Judge Louie Gohmert.

Mr. Chairman, I look forward to working with you on this legislation again. And I hope that we will successfully address this issue in the 110th Congress. And I yield back the balance of my time.

Mr. BERMAN. Thank you.

Justices Breyer and Alito, we welcome both of you, and thank you for joining us this morning.

Justice Stephen Breyer is a graduate of Stanford, Oxford and Harvard Law School. Prior to his service on the Supreme Court, he taught law for many years as a professor at Harvard Law School and at the Kennedy School of Government. He also worked as a Supreme Court law clerk for Justice Arthur Goldberg, a Justice Department lawyer and assistant Watergate special prosecutor and chief counsel of the Senate Judiciary Committee.

In 1980, he was appointed to the United States Court of Appeals for the First Circuit by President Carter, becoming chief judge in 1990. He was appointed to the Supreme Court by President Clinton in 1994.

Justice Samuel Alito, Jr., was nominated as an associate justice of the Supreme Court by President George W. Bush and was sworn in on January 31, 2006. He previously served as a judge of the United States Court of Appeals for the Third Circuit, having been appointed by President Bush in 1990.

He began his legal career as a law clerk for the Honorable Leonard Garth of the United States Court of Appeals for the Third Circuit from 1977 to 1981. He was an assistant U.S. attorney in Newark, NJ, from 1981 to 1985. He was an assistant to the Solicitor General of the United States and in that capacity briefed and argued numerous cases in the United States Supreme Court.

From 1985 to 1987 he was Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. He was appointed in 1987 by President Reagan as U.S. Attorney for the District of New Jersey and held this office until his appointment to the Third Circuit.

Colleagues, I think we should allow the witnesses to testify and not interrupt them.

Justice Breyer?

TESTIMONY OF THE HONORABLE STEPHEN G. BREYER, PRESIDING JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC

Justice BREYER. Mr. Chairman and Mr. Chairman of the Committee, Ranking Member, both of the full Committee and the Subcommittee, and the other Members that are here, I appreciate very

much your being here. And we both appreciate very much your having this hearing.

I have to say I am a little nervous about it. I am not too happy. Why? Because I am talking about judicial pay. Now, a person talking about his own pay may be somewhat biased. And he is going to be thought to be biased.

And moreover, as you pointed out, Congressman, Ranking minority Member, you are quite right. We make quite a lot more than the average person. And in a way, here I am talking through you to your constituents. And how do you tell somebody, a man or a woman, that you ought to be paid considerably more than they are?

That is not an easy thing to do. And I have thought about it. And well, I am here. We are here. I think, in part, our being here is an indication of this topic's importance because we aren't here often.

It is partly what you said, Chairman Conyers. Hamilton said, you know, the choice is between firm, independent judges or the bayonet.

And Madison—along with others wrote those words in the Constitution. There isn't too much about judges in the Constitution. It is small compared to the other branches. But it does say that they are to be appointed at a compensation that shall not be diminished. And it has been diminished a lot in real terms. And we both think that—and I think a lot of the judges think—that though, I grant you it is in their interest. But there is a whole stack of newspaper editorials and others who think this, too, that it has gone too far and it is a problem and it is a serious problem. And really, I think that is why we are here.

Now, what do I say to the average man and woman? I tried to boil it down to four points really. As a former teacher, I like to have four points. And these are the four points. I would say first of all, look at these numbers. They don't show a little diminishment in judicial pay. They show a lot. And cut it up, down or sideways. You cut it any way you want.

I say, as you said, Congressman Smith, quite rightly, you go back over the course of my career, professional career and what you see is a steadily downward trend. I mean, compensation is real. You have to pay for food with real dollars. It is not phony, inflated dollars. And when you look in terms of real compensation, what you discover compared to the average American, that the judge pay has dropped 50 percent really, just about 50 percent.

Or look at it in terms of the academic profession. I just received an e-mail from Lou Pollock. Some of you know Lou Pollock. He started teaching at Yale—he is now a very distinguished district court judge.

And Lou can remember the dean calling him in and saying some day if we are lucky we are going to get our pay inched up toward the level of the Federal judge. Well, it used to be it was 40 percent behind. Now, today, it is the judge who is 40 percent behind the professor and the dean is way ahead of that.

Or look at the non-profit sector. That is not the private bar. We have graphs if you want; if I get a little dull. Look at the graphs in here. They are pretty interesting. And they will show in the non-

profit part, the top executives are paid twice as much as the Federal judge. That didn't used to be so.

Or if you go and, as you were saying, compare it to the other part of the government, the executive branch. This is a list of summaries here because the staff at the administrative office went through, and they just tried to find out by looking at a day's worth of advertisements for jobs in the executive branch that pay more than a Federal judgeship. Well, here is the list. There are five or six on a page. Now, a lot of them are medical. But some are legal. And some are purely administrative.

So look at it up, down, sideways. I don't care how you count it. And I haven't even mentioned the private sector. And the only thing I had mentioned about the private sector—nobody expects—you are absolutely right—nobody expects in public life—and they shouldn't—to make anywhere near the private sector, the private bar, the private firm. But it used to be it was like three to one. Now it is seven to one.

So you look any way you want. And I think that number—the number I usually use is the one that was used here, a Federal judge's salary has declined 50 percent compared to the average American over the last 40 years. Now, my second point, to put the question to myself: so what? As you said, there are a lot of perks. What perks? Being a Federal judge is a terrific job. It is a wonderful job. Being in public life has tremendous rewards. So what is the problem?

And what I say is I can't prove it, but I say there are bad signs. Well, what? Well, one bad sign is the number leaving the judiciary. We looked back over the last few years, and you go back 5 years or so, and it is approximately 40 fewer judges. That was unheard of. Go back to the 1970's, 10 maybe. Where did they go?

Well, the kind of thing that frightens me that I don't like is I looked at the roster of a prominent arbitration company. You know, you don't have to go into private practice. Arbitration, that is what you like doing as a judge. I found the names there of 21 former Federal judges.

And why do I think, "Oh, dear"? And I do think, "Oh, dear." I think, "Oh, dear" because it means that there is a risk that this job which I love—it is not just the Supreme Court, either. It is the district court, or it is the court of appeals. It becomes a stepping stone. And Learned Hand said that, or I was told he said that. The day that that job becomes a stepping stone instead of a capstone, which is what it is supposed to be, the capstone of a career, not a stepping stone to some other thing, that is death for the judiciary. That is not good.

Well, go look at the roster. And then I go out and say—well, I think you said it exactly, Chairman Conyers. It is what I believe. You say, well, what is it about attraction? Isn't there a line a mile long trying to be Federal judges? Yes. And you mean they are all bad people? No.

A lot in that line are very qualified people, very qualified. Well, what is the problem? Well, to me the problem is this. Because the word I use is the word diversity. And diversity—by that I don't mean just racial diversity, and I don't mean just gender diversity. I mean, I think that the Federal judiciary should have diversity—

and I believe this very much in my heart. What is it supposed to be in terms of the personnel? Two things.

Taken as a group, it should represent that community. The Federal judges should grow out of the community. And as individuals, that job should be opened to everyone who has the possibility through intellect, through training, through character. If you have those qualifications, the judiciary should be open to you, and it shouldn't be reserved for the man or woman who saved up $10 million or $5 million.

I am not saying eliminate it, but, it shouldn't be overwhelmingly people who followed the professional judicial career path, you know, government and then—I mean, there have been some great judges who have come out of that path. But it used to be that those professionals, State court, magistrates, and so forth, it used to be they accounted for about 20 percent of the judiciary. Today it is more than half.

Now, that isn't, I think, what you want. What you want is an open, diverse judiciary. And you can have a judiciary, you know, that is a totally professional judiciary. They have that in France. They have that in continental Europe. And there are many good judges in that system.

But that system is not our system. And it shouldn't be our system. See what I haven't said? I haven't said judges deserve more money. And I deliberately don't' say that because I don't think there is a divine spirit that tells us how much money people should make. But I do think it matters to the nature of the judiciary. So that is my second point. And I have tried to describe why.

But I have to do more than that for the average man or the average woman because while you know and you understand what kind of institution we are dealing with, a lot of people don't. And I try to say, well, what is it that you are doing here? You are running a risk of damaging the judiciary.

People are motivated by a lot of things. And in public life they are not directly motivated by money. But it is part of the mix. So I say what you are doing is you are running a risk. A risk of what? I say it is a risk to the kind of independent judiciary that Hamilton and Madison wanted. What is that for me, says the average person?

I try to explain it like this. And I talk to school groups. And I try to—this is a point I try to make to people. I say, well, look, let me show you something. I once was in a meeting in Russia. And Yeltsin was there. And they had judges from all over Russia. And they were talking.

And Yeltsin came in and said I am going to make you independent and I am going to give you a pay raise. Well, they liked that. And after, they were talking about it, and they were saying do you think it means the end of telephone justice. I said, what is that. They said, telephone justice—you must know it. I don't know. What is it?

They said, well, telephone justice is when the party boss calls you on the telephone and says how to decide the case. Well, why did we do that, they were asking themselves. We know why we did it. We needed the apartment. We needed the education for our children. We needed the perks that a yes response would give.

And then they asked me. They said, do you have that in the United States? I said, no. And they looked sidewise. And I say, you would think I would say that even if the answer were yes. I said well, it is no. And I went on at such length they began to believe me.

But what I want to say to the public, the people who aren't lawyers is I will tell you one thing independence means. Independence means no telephone justice. So if you have the misfortune to be in court, I will tell you you want somebody up there, if you are the least popular person in the United States, who can handle that job and is not going to be swayed except by the merits of your case.

Then I like to repeat sometimes something that I heard Alan Greenspan say. He said that if he was going to have one reform for a lot of the countries that want development, he would say have an independent judiciary so that when a contract dispute comes up, there will be a judge there who understands how to deal with it and who will be fair. And then there will be the investment. And then you will have the prosperity.

And then sometimes I like to tell the story—I won't go into too much length. But I love this story because it is true. And I go back—I usually tell the students particularly about two or three cases. I say I would like to tell you about the Cherokee Indian case because that was a case in Northern Georgia where the Georgians took over the land. And the Supreme Court said that the land belongs to the Cherokee Indians. And Andrew Jackson supposedly said well, John Marshall made his decision. Let him enforce it.

And Andrew Jackson sent troops. And those troops went not to enforce the law. They went to evict the Indians. And the Indians went from Georgia to Oklahoma. A lot of them died. And there are a lot still there that are descendants.

So I said I want you to compare that case to a case that was one of my favorites that happened more than 100 years later that is called, as you know, *Cooper v. Aaron*. And in *Cooper v. Aaron* there was another public official who wanted to defy the law. He was Orval Faubus. And Orval Faubus stood in that schoolhouse door and he said, "I have the militia. You may have the judges, but I have the militia, and I am not going to do it. I am not going to integrate the schools."

And President Eisenhower, a different president at that time, called in the 101st Airborne. And they went there. And the paratroopers took those Black children by the hand, and they walked into that White school. And what I wanted to tell the 10th-graders is that was a great day for America. That was a great day.

I once had a Russian paratroop general at the court. He was the man who had been in charge of the missiles. And he turned the direction of the missiles. And I told him the story of that case. And I said it shows you that the paratroopers and the judges must be friends.

But you see, you take controversial cases. You take your choice. And I have heard people say this, and I say it. Where are those bayonets on the street? They aren't there. Is it because people don't feel strongly? No, they feel strongly.

But they have learned no bayonets, no riots, no force. Hamilton was right. American citizens have learned how to follow the law.

Now, I described that in 5 minutes because I want you to see what I feel every day when I look, I am sitting there, and I look out across that courtroom and I see people of every race, every religion, every point of view. And they are in front of us, and they are resolving their disputes under the law.

Now, I do say this because I want you to see emotionally what I feel about this institution. And so, you say well, what has that to do with the pay? And I say in my mind, that is the connection.

The connection is what risks do you want to run with that institution? And in my mind, it is no more than a risk. You can't prove it. But it is a big risk. And I wouldn't run that risk at the point that the numbers start to show up where they are.

And that is really my last point. My last point is, well, is the judiciary, are the judges special? No. No, compared to Congress, compared to the executive branch. And I believe your pay is right in the same place, the same place with the same problem. And I say if you start over a course of 40 years cutting the pay at the top of the forest service, you will find after 40 years that those trees aren't quite as well taken care of.

And if you over a period of 40 years cut and cut and cut the real pay of the foreign service, you will find that there are more mistakes. And then there can be a snowball, you know. Cut at the top, morale drops, the job isn't done quite as well. You don't attract quite the people you once did. And it is slow and insidious. And over time, you find that treasure that you had is gone, or if not gone, weakened.

I think it is the same with the other institutions. But I am a judge. And I have devoted more than 20 years to that job. And I believe I understand the institution. And every part of me says what is true every day, that this is a treasure to have, that courtroom where people come in and decide their disputes under law.

And I see the judiciary pay 50 percent down. I see that as a genuine threat. And I hope very much the country—and it is the country won't run the risk with this institution. That is why I am here.

Thank you.

[The prepared statement of Justice Breyer follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN G. BREYER, PRESIDING JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC

Judicial Compensation and Judicial Independence
Statement of Justice Stephen Breyer
April 19, 2007

Mr. Chairman, Members of the Committee,

I appreciate your invitation to testify today about judicial compensation. While it is certainly an honor to be invited, I am not happy to be here. That is because I must discuss judicial pay, the severe erosion of real compensation levels, and the connection between that erosion and the institution's health. Since I am a judge, there is an obvious degree of self-interest. And I fear that this self-interest may lead the public to discount what I say when I attempt to demonstrate that the compensation problem ultimately threatens harm to the American public, whom our independent federal judiciary seeks to serve.

Moreover, I am testifying about real compensation levels that are higher than those of the average American. It is not easy to explain to any man or woman why my pay should be higher than his or hers. Finally, I am making an exception to an important practice. Separation of powers concerns, which both Legislative and Judicial Branches share, have limited the occasions on which members of the Supreme Court have testified before Congress.

I do so today because I believe that something has gone seriously wrong with the judicial compensation system. Compared to the average American, real judicial compensation levels over time have fallen by nearly 50%; and that decline threatens to weaken the institution. Perhaps by appearing on behalf of the judicial institution and speaking directly to you in the Legislative Branch, who are facing a similar problem, I can help to explain the problem, and why something must be done.

I

I begin with the Constitution's Framers. The Framers emphasized the importance of judicial independence and the connection of compensation with that independence. Alexander Hamilton sought constitutional guarantees that would help to assure that the Judicial Branch, though the "weakest Branch" of the federal government, would remain strong and independent. He said that the "independence of the judges, once destroyed, the constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate."

What did Hamilton mean by the term "independence"? My colleague Justice Ginsburg has written that independent judges are judges who do not act on behalf of particular persons, parties, or communities. They serve no faction or constituency. And they strive to do what is right in each individual case, even if the case in question should pit the least popular person in America against the most powerful government in the world. Justice Kennedy recently captured the point when he noted: "Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must."

How did the Framers seek to assure that independence? They were aware, as the Declaration of Independence states, that the English King had "made Judges [in the colonies] dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." They wrote into the Constitution guarantees that federal judges would serve "during good behaviour" and that the judges' compensation "shall not be diminished during their continuance in office." And they expected that around these guarantees would arise traditions of independence, supported by customs and understandings, which together would assure a truly independent judicial branch. Hamilton pointed out the obvious: "If the laws are not suffered to control the passions of individuals, through the organs of an extended, firm and independent judiciary, the bayonet must."

In a word, the Framers saw the need for an "extended, firm and independent" judicial branch. And they saw a connection between that goal and judicial compensation. My testimony will focus upon that connection.

II

To state the problem in a nutshell: The real pay of federal judges has diminished substantially over nearly four decades. The gap between judicial compensation levels and compensation levels, not just in the private sector, but also in the non-profit sector and in academia, has widened substantially. The result is a threat of serious harm to the federal judicial institution and ultimately to the public that it serves.

A few facts will help to show what I mean. First, in real terms (which measures pay in constant dollars to take account of inflation), the pay of federal judges has dramatically declined over the past several decades. Between 1969 and 2007, real pay for federal district court judges will have declined nearly 27%. During the same period the real pay of the average American worker is projected to have increased by more than 23%. To restore the relationship between judges' real pay and the real pay of the average American, a federal judge's paycheck would have to make up for that nearly 50% decline. I add that the same is true with respect to Members of Congress.

Second, I shall for the moment put to the side any comparison with the private sector. Government does not and should not offer the monetary awards available in the private sector. But consider a comparison between judicial salaries and compensation offered in certain *non*-profit sectors of the legal profession. There too we find a widening gap. In 1969 when I began teaching law, a top professorial salary (for teaching and writing) was $28,000; the Dean received $33,000; and a federal judge received $40,000, about 40% more than the professor. Today, salaries alone (without compensation for consulting) of top professors at leading law schools can exceed $300,000; a Dean's

salary at several important schools exceeds $400,000; but a federal district judge receives $165,200, approximately half of what the top professors are paid. Indeed, the January 2003 Report of the National Commission in the Public Service, which was chaired by Paul Volcker, pointed out that salaries paid to CEOs of average *non*-profit organizations were far higher than those paid to federal judges. Today, CEOs of large non-profits on average make nearly double the salary of a federal district court judge.

Third, breaking my promise to put the private sector to the side, I want to offer a glimpse of the temptations that lurk there. If the figures show a gap in judicial pay and certain non-profit sector jobs, here they show a chasm the size of the Grand Canyon. Partners' salaries at large firms are on average more than $1 million per year. But from temptation's point of view what is important is not the sheer size of the salary but the significant widening of the chasm. Twenty years ago, a federal judge's salary was about 1/3 what that judge would have made as a partner at a large firm; today it is about 1/7 as much. Indeed, you probably have heard about the young law school graduate who, after he leaves his first job as the federal judge's law clerk, makes more money in his first year of practice than the judge. While that story was once hyperbole, today it is an everyday reality.

Fourth, many positions in the Executive Branch of the Federal Government now offer salaries far higher than the salaries of district court judges (or Members of Congress). The Office of Thrift Supervision, for example, recently recruited for five high-level positions, offering annual salaries of up to $305,166. The Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and quite a few other agencies offer salaries to lawyers, as well as to administrators and medical personnel, of $200,000 or more. The Administrative Office compiled a list of offers for vacant Executive Branch positions (including many medical and similarly technical positions) paying more than a federal judge's salary. The list, with each position placed on one page, is more than an inch thick.

Finally, for purposes of completeness, I include a few international comparisons. Those who join the federal judiciary used to believe, and still believe, they are becoming members of the world's finest judiciary. They also found that their pay was higher than that of judges elsewhere. Today, they often find that it is considerably lower. Indeed, federal district court judges in the United States now receive only 2/3 of the salaries of their judicial counterparts in Australia and approximately 1/2 of their judicial counterparts in England.

The upshot is that however one looks at real judicial compensation, across time, with an eye toward "profit," "non-profit," or "foreign" salaries, or through a comparison with change in the real compensation level of the average American, one consistently finds declines and gaps that are serious in nature and that have worsened significantly over time.

III

These figures and the underlying reality reveal a problem. That problem is not about what judges as individuals might in some metaphysical sense "deserve" to be paid. Many Americans are paid less than what morality suggests they "merit." In this world, there is no pay scale that accurately measures an individual's "just deserts." But if the problem has little to do with a scale of merit, it has everything to do with institutional strength.

How does the compensation problem adversely affect the health of the judicial institution? For one thing, declining pay means financial insecurity. And unlike many Americans who do not have a choice, judges who worry about how to educate their children do have a choice. They can leave the bench. They may return to law practice. Or, they can enjoy the non-pecuniary benefits of a job in the non-profit world while also finding the money needed to pay for college tuitions by becoming law school deans or highly paid arbitrators or mediators. (One prominent dispute resolution firm offers the services of twenty former federal judges.) When I became a federal judge in 1980, it was extremely

unusual to hear of a judge leaving the Bench to take a job elsewhere. But since just last year, ten Article III judges have departed from the bench. Seven of those ten judges sought employment in other sectors of the legal community. This is not a one-year blip. Indeed, in 2005, nine Article III judges departed from the bench. Four of the nine joined a private firm that provides arbitration and mediation services. Of course, one cannot be certain of the role financial insecurity played in any individual's decision to leave the bench. Such decisions always reflect a mix of motives, some unknown even to the departing judge. But I suspect that declining real compensation played a significant role.

The departures themselves mean that the judiciary has lost fine judges. But far worse is the message that the departures send to others. They suggest that the financial problem is real. And if that is so, and if departure is the remedy, some applicants or the public at large may come to think of a judicial appointment, not as the "capstone," of a legal career but as a way station. Indeed, any perception that a judicial appointment is a "stepping stone" towards a more lucrative undertaking would seriously harm the judicial system, for it is directly at war with judicial independence.

For another thing, the decline in real pay levels can make a difference with respect to the pool of applicants. I do not mean that there is a shortage of applicants. I do mean, however, that a federal judgeship should not be reserved primarily for lawyers who have become wealthy as a result of private practice, or for those whose background is that of a judicial "professional," *i.e.*, a state court judgeship or a magistrate position followed by an Article III appointment. I do not mean that those who come from those backgrounds make lesser judicial contributions. To the contrary, some of our finest judges have previously been state court judges or magistrates or successful private practitioners. I do mean that a federal judicial opening should not be beyond the reach of any lawyer whose qualifications of intellect and character indicate that he or she is well suited to the job. The federal bench should reflect diversity not simply in terms of race or gender, but in respect to professional background as well. A federal district court is a

community institution. The federal judiciary will best serve that community when its members come from all parts of the profession, large firms, small firms, firms of different kinds of practice, all varieties of government practice, other courts, and academia.

That diversity, important as it is to the institution, is gradually disappearing. If one examines the federal district court judges at the time of President Eisenhower, one finds that only about 1/5 previously had been state court judges or magistrates. If we examine appointees in the last fifteen years, however, the percentage of those whose career has followed a judicial "professional" path has increased, from about 20% to more than 50% of district court judicial appointments, and the percentage coming from other sectors has correspondingly declined.

These figures mean that those who followed the judicial "professional" path accounted for roughly one in five district court judges fifty years ago, but they now account for more than one out of every two appointments. I repeat that those who have previously served as state court judges or magistrates are typically fine judges. But the growth in the number of such appointments indicates a judiciary that has become increasingly professionalized. Many other nations, France and Belgium for example, have professionalized their judiciaries. But that is not our tradition. Nor, given the need for federal judges to interpret the Constitution and apply that document to protect the basic rights of 300 million Americans, do I believe it is desirable for our Nation to go the way of continental Europe. Would a continental style, highly professionalized judiciary have written *Brown* v. *Board of Education*? Could it have survived that decision's aftermath? Of the adverse tendencies of a real salary decline that I have mentioned thus far, it is the loss of diversity of background and the increased administrative "professionalizing" of the judiciary that I most fear.

Finally, there are what I think of as "intangible" harms, including harms that snowball, each harm building upon the others in ways that, at first subtly, and then radically, change the nature of

an institution. Based upon my own experience in government, I believe that over time salary differences do matter. Continuous cuts in the salaries at the top in any sector (public or private), cuts in the salaries of those who lead an organization, may sap the institution's strength. They will lower morale, harm the institution's reputation, and diminish its power to attract and to retain well-qualified employees. These consequences in turn bring about diminished institutional performance, which then results in public disenchantment. In the case of the judiciary, intangible harms of this kind threaten the Framers' constitutional objective, a strong, independent judicial institution.

IV

In discussing potential harm to the judicial institution, I deliberately hedge, using words such as "threaten" that indicate what could conceivably transpire, not what will inevitably occur. That is because the strength of an institution, and certainly a judicial institution, depends upon many different factors, of which monetary compensation is only one (and not necessarily the most important). Because we are discussing a risk posed to the "firm and independent judiciary" of which Hamilton spoke, I shall turn to the related subject of this hearing, judicial independence, and describe from my own experience a few of the reasons why this risk is not worth running.

First, I learned what the words "independent judiciary" do *not* mean at a meeting of judges I attended fifteen years ago in a newly independent Russia. I heard the judges talking about something called "telephone justice." That, they said, occurred when the party boss would call to tell the judge how to decide a particular case. Why did we do it, they asked each other. We all know why, they answered: Because we needed the apartment for our families, the education for our children, the economic necessities that the Communist Party controlled. In turn, the judges asked me whether we had telephone justice in the United States. I could answer honestly, no. Our judges were independent.

I believe I convinced them that was so. And how proud I was to belong to a judicial system where I could simply and truthfully give that answer.

Second, I remember listening to Alan Greenspan tell an audience that, if he could create a single institution necessary to promote economic development and thereby create the conditions necessary for economic prosperity, it would be an independent judiciary. That institution would assure the honest enforcement of contracts, produce investment, and lead to prosperity. I think about Chairman Greenspan's statement when I am at the local supermarket or mall and consider the vast display of high quality goods.

Third, when I speak to high school students, I often contrast three Supreme Court cases that illustrate this Nation's journey toward judicial independence and the rule of law. The Court decided the first case, *Worcester* v. *Georgia*, about one-hundred-eighty years ago. In *Worcester,* the Court determined that land in northern Georgia belonged to the Cherokee Indians and not to the Georgians who had seized it. The President of the United States, Andrew Jackson, then supposedly said, "John Marshall," the Chief Justice, "has made his decision. Now let him enforce it." President Jackson then sent troops to Georgia, not to enforce the Court's decision, but to evict the Indians, who traveled the Trail of Tears to Oklahoma where the descendants of the few who survived live to this day.

The Court decided the second case about one-hundred-thirty years later. The Court held in *Cooper* v. *Aaron* that *Brown* v. *Board of Education* meant what it said: Little Rock, Arkansas must integrate its schools. But Arkansas' Governor, Orval Faubus, stood with his state troopers in the schoolhouse door and defied the Court's ruling. This time, a different President, Dwight Eisenhower, dispatched troops but with a mission to enforce, rather than to reject, the law. And those federal paratroopers took the black children by the hand and walked with them into what had been an all-white school.

Now consider any recent controversial case: eminent domain? prayer in public schools? even *Bush* v. *Gore*? The most remarkable feature of those cases, I tell the students, is a feature that rarely receives comment. After the Court issued decisions in those cases, cases that elicited very strong feelings, no President needed to dispatch paratroopers to enforce the decree. There were no riots, no fighting in the streets. Americans who strongly disagreed with the Court's decision in some of those cases (and I disagreed with the Court's decision in some of those cases) have nonetheless agreed to follow the law. That is progress. That is what we mean by a "rule of law." And it is a hard-earned lesson about the rule of law that this Nation has taken to heart over the course of a history that includes a Civil War and 80 years of legal segregation.

Finally, when I take my seat on the bench for oral argument, I have the privilege of looking out over a courtroom where many of this Nation's most important cases have been decided. In this very room, I sometimes think, *Brown* v. *Board of Education* was handed down. I see before me people of every race, every religion, and every point of view imaginable. And I am confident that, even though those individuals may not always agree with one another, they will resolve their differences, not in the street, but in the courtroom. This fundamental trust in the law, this habit of following the law, this respect for the rule of law, helps to bind together our three hundred million people as a Nation. As you well know, not all peoples in all nations resolve their disputes according to the rule of law. We do. And that is a national treasure.

An independent federal judiciary plays an important role in maintaining that rule of law. But the judges cannot act alone. Trust and confidence in the institution on the public's part; integrity, competence, and sometimes courage, on the judges' part; respect and understanding on the part of others in public life — all have important roles to play. The importance of the end result, an effort by the Nation to realize the promises of its Constitution, justifies the institution. And, in my view, the importance of that

end helps to explain why it is unwise to run a significant risk of harming or weakening the judicial institution.

That is the connection I see between the present compensation problem and judicial independence; and that connection helps to explain where I believe the claim for restoration of judicial compensation truly lies.

V

I conclude by making clear that much of what I have said in respect to the relation between real compensation levels and institutional strength has general applicability. A strong judicial branch is no more important to the American public than a strong Legislative Branch or a strong Executive Branch. The roles those other Branches play are, or course, no less crucial than our own. And the continuous cutting of the real salaries paid top officials in the other Branches threatens the strength of those institutions just as it threatens the judiciary.

To harm these institutions is to harm the public whom the institutions serve. That is so whether the institution in question is the Foreign Service, the Forest Service, the Congress of the United States, or the federal judiciary. I have spoken of harm in respect to the judiciary because I have served as a judge for twenty-six years; and that is the institution I know best. But I also know that if Foreign Service officers are not paid properly, we will suffer in the long run from an inability to work with other nations; if the Forest Service is not paid properly, the wilderness will surely suffer. And similarly, without adequate compensation — if Congress permits the judges' real pay to erode without redress — we cannot expect the federal judicial system to function independently and effectively, as the Constitution's Framers intended.

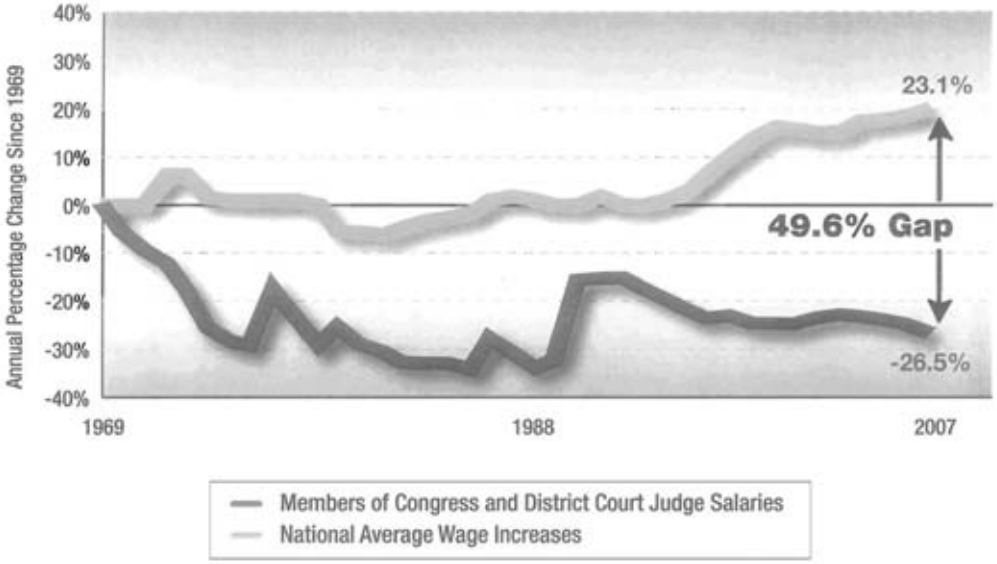
I appreciate the opportunity to appear before you and to address the compensation issue. I am happy to answer questions.

Thank you.

Appendix 1

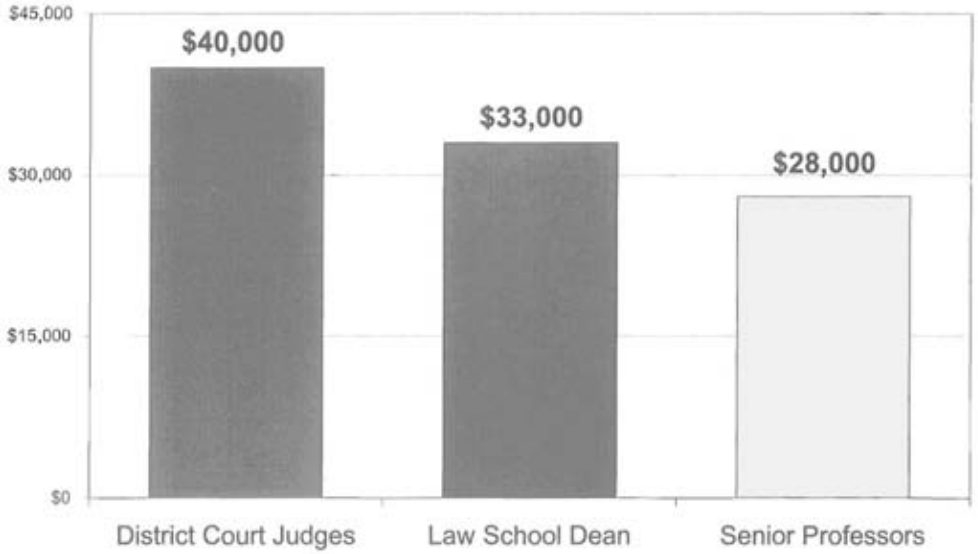
ts Demonstrating the Decline in Judicial Compensati

Decline in Salaries of Members of Congress and District Court Judges Compared to Average U.S. Worker Wage Gains, Adjusted for Inflation From 1969 Through 2007 (projected)



Data from BLS CPI-U Index/Inflation Calculator (inc. forecasted 2.25% inflation for 2007), and Social Security Administration National Average Wage Indexing Series (inc. forecasted 5.1% for 2006 and 4.94% for 2007). Federal judges have not received a pay adjustment for 2007.

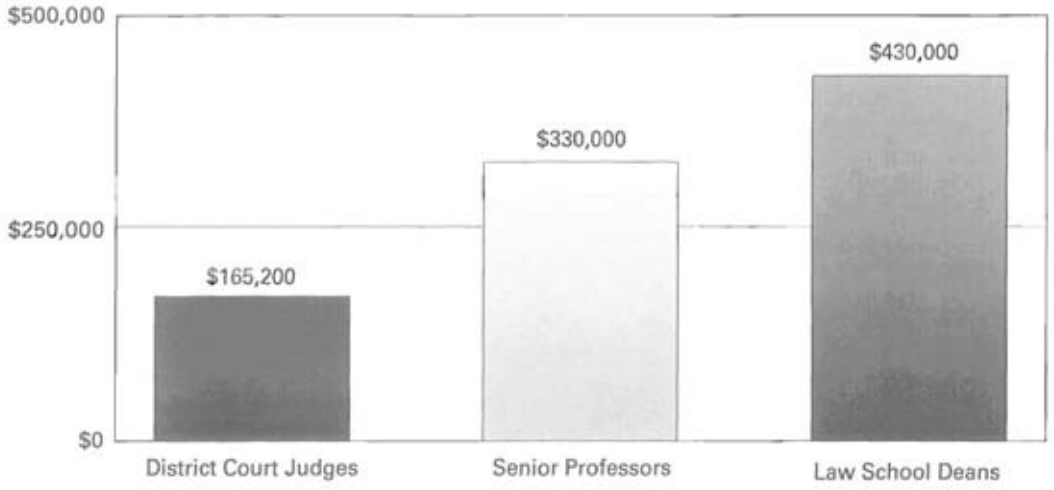
Comparison of Salaries of Dean and Senior Professors at Harvard Law School with U.S. District Court Judges in 1969



Data based on information received from Harvard Law School. Professors' salaries based on a 9-month teaching schedule.

Prepared by: Administrative Office of the U.S. Courts

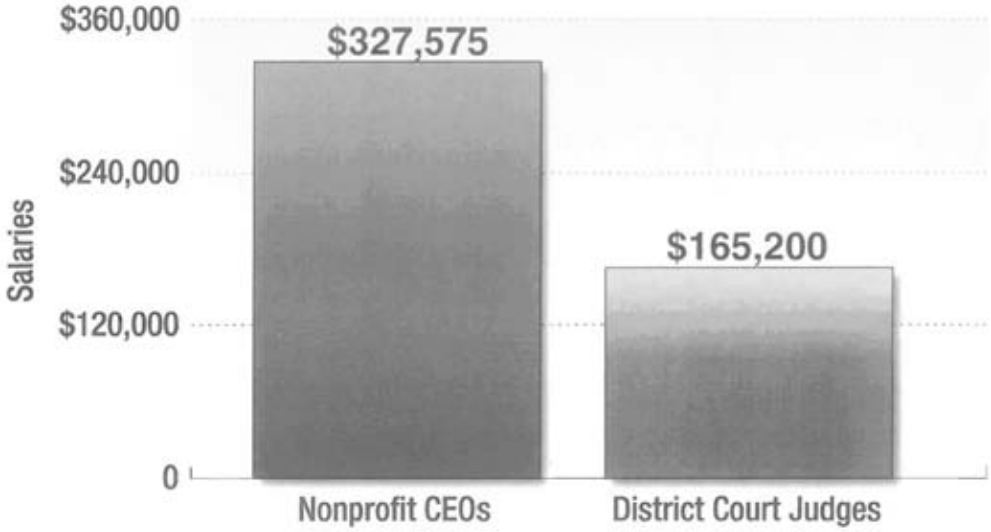
Comparison of 2006 Salaries of Deans and Senior Professors of Top Law Schools with U.S. District Court Judges



Based on informal and confidential survey of law school administrators and most recent available data. Professors' salaries based on 11-month long teaching/research schedule.

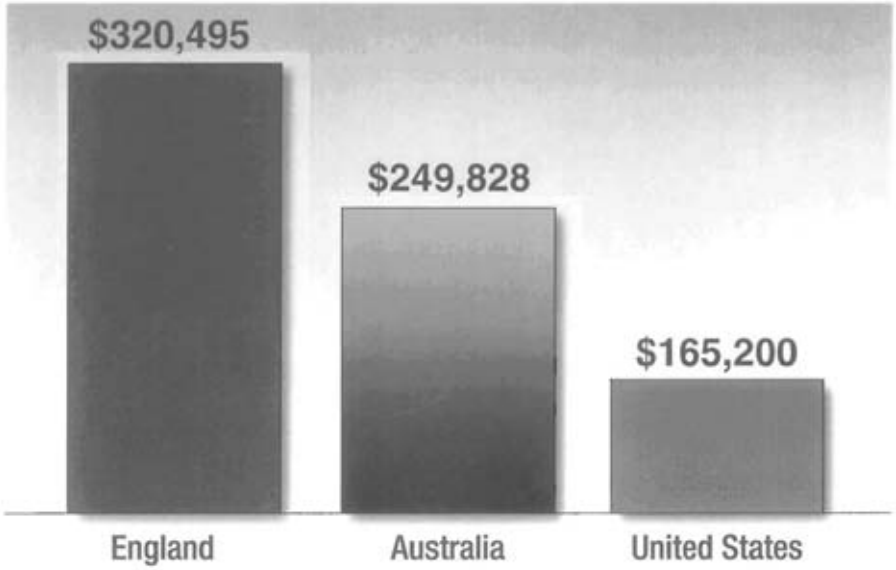
Prepared by: Administrative Office of the U.S. Courts

Comparison of Salaries of Federal District Judges and Chief Executive Officers of Large Nonprofit Organizations



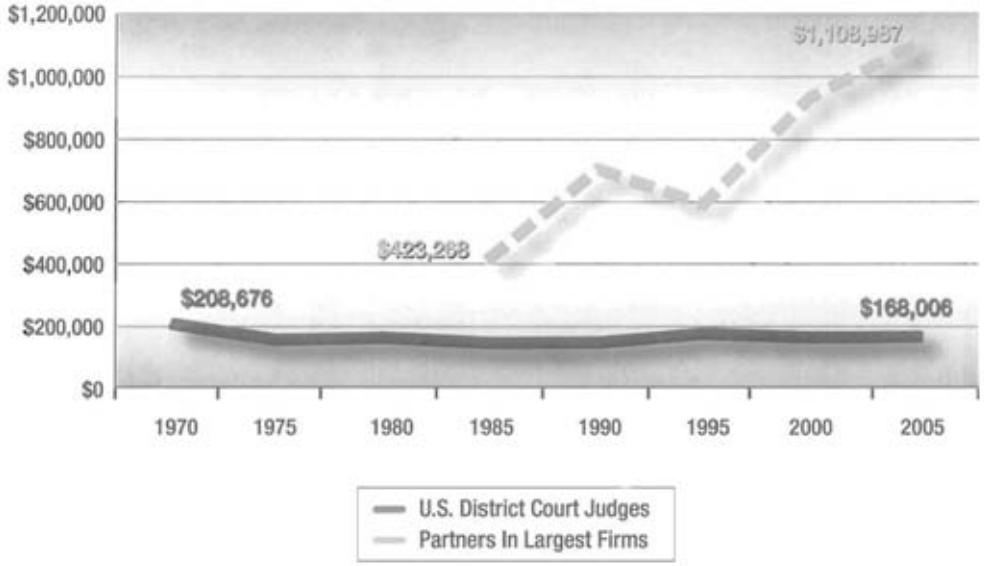
CEO salaries are for 2005 (most recent available) from survey conducted by *The Chronicle of Philanthropy* (9/28/06 issue). District court judge salaries are current 2007 levels.

Comparison of Adjusted 2007 Salaries of District Court Judge Equivalents in Australia, England and the United States

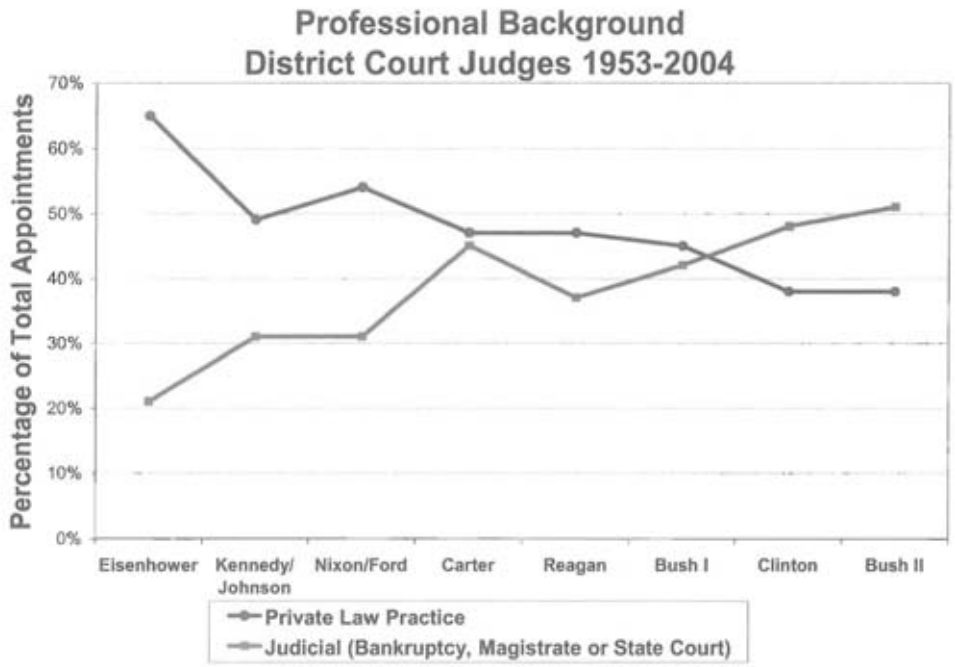


Foreign salaries converted to U.S. Dollars (using 4/3/07 currency exchange rates).

Salaries of Judges and Law Firm Partners Adjusted to 2007 Dollars



Data based on annual "Profits Per Partner" data compiled by American Lawyer magazine for referenced years (first compiled in 1985). Salaries and profits adjusted to current year using BLS Inflation Calculator.



Prepared by: Administrative Office of the U.S. Courts

Appendix 2

Excerpt from the Report of the National Commission on the Public Service (Volcker Commission), January 2003

American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must be Fairly Paid, March 2007

URGENT BUSINESS FOR AMERICA

REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY

REPORT OF
THE NATIONAL COMMISSION
ON THE PUBLIC SERVICE

JANUARY 2003

As noted above, every presidential appointee must navigate through endless forms and questionnaires probing into every detail of his or her life before entering public service. Thousands of federal employees spend their days investigating the behavior of other federal employees. Requirements that employees divest themselves of financial holdings sometimes go beyond what is rational and can result in unjustified financial loss to the employee.

> One study found that in the years from 1995 through 2000 99.99% of all the public financial disclosure forms filed in those years were never viewed by anybody in the public.
>
> *G. Calvin Mackenzie, Visiting Fellow, The Brookings Institution*

The "ethics" barriers create a climate of distrust that limits lateral entry of talent into government, which in turn creates a gulf of misunderstanding and suspicion that undermines government performance. Mission-related personnel interchanges would benefit those in government who work with the private sector and those in the private sector who work with government. At critical junctures in our past — during the two world wars, for example — such interchanges contributed vitally to the accomplishment of important government missions. But current ethics laws now prohibit virtually all such personnel movement.

We urge Congress to make federal ethics rules cleaner, simpler, and more directly linked to the goals they are intended to achieve. Specifically, we recommend that legislation be enacted to reduce the number of federal employees required annually to disclose their personal finances and that Congress enact legislation recommended by the Office of Government Ethics and currently pending in the U.S. Senate to simplify the personnel disclosure forms and other questionnaires for presidential appointees.

We urge Congress to seek a better balance between the legitimate need of the public for certain limited personal information about public servants, and the inherent rights of all Americans — even public servants — to protection from unjustified invasions of their privacy. Such a restriking of the balance, we firmly believe, will make public service much more attractive to the kinds of talented people government must recruit and retain in the years ahead.

RECOMMENDATION 9

Congress should grant an immediate and significant increase in judicial, executive, and legislative salaries to ensure a reasonable relationship to other professional opportunities.

Judicial salaries are the most egregious example of the failure of federal compensation policies. Federal judicial salaries have lost 24 percent of their purchasing power since 1969, which is arguably inconsistent with the Constitutional provision that judicial salaries may not be reduced by Congress. The United States currently pays its judges substantially less than England or Canada. Supreme Court Justice Stephen Breyer pointed out in testimony before the Commission that, in 1969, the salaries of district court judges had just been raised to $40,000 while the salary of the dean of Harvard Law School was $33,000 and that of an average senior professor at the school was $28,000.

That relationship has now been erased. A recent study by the Administrative Office of the U.S.

"Inadequate compensation seriously compromises the judicial independence fostered by life tenure. The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance."

William H. Rehnquist, Chief Justice, U.S. Supreme Court

Courts of salaries of professors and deans at the twenty-five law schools ranked highest in the annual *U.S. News and World Report* survey found that the *average* salary for deans of those schools was $301,639. The average base salary for full professors at those law schools was $209,571, with summer research and teaching supplements typically ranging between $33,000 and $80,000. Federal district judges currently earn $150,000.[10]

Also in testimony before the Commission, Chief Justice William Rehnquist noted that "according to the Administrative Office of the United States Courts, more than 70 Article III judges left the bench between 1990 and May 2002, either under the retirement statute, if eligible, or simply resigning if not, as did an additional number of bankruptcy and magistrate judges. During the 1960s on the other hand, only a handful of Article III judges retired or resigned."

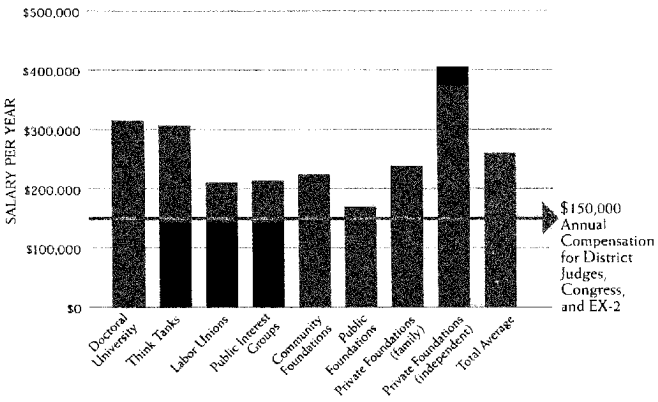
The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America's best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment — and compensation — rather than making the important contributions we have long received from judges in senior status.

Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice. We are not suggesting that we should pay judges at levels comparable to those of the partners at our nation's most prestigious law firms. Most judges take special satisfaction in their work and in public service. The more reasonable comparisons are with the leading academic centers and not-for-profit institutions. But even those comparisons now indicate a significant shortfall in real judicial compensation that requires immediate correction.

Executive compensation has reached a similar crisis. Today, in some departments and agencies, senior staff are paid at a higher level than their politically appointed superiors. We recognize that some appointees enter office with enough personal wealth to render salaries irrelevant, while others see great value in the prestige and future earning potential associated with high public office. Increasingly, more are dependent on the salary of an employed spouse. But the good fortune — or tolerance for sacrifice — of a few cannot justify the financial burdens that fall on the many.

Cabinet secretary pay rose 169 percent between 1969 and 2001. But in that same period, according to the Bureau of Labor Statistics, the Consumer Price Index for urban consumers increased 391 percent. Measured in constant 2001 dollars, the salaries of cabinet secretaries have actually declined 44 percent since 1969. During this thirty-two year period, the salaries of cabinet officers have lost more than 50 percent of their value with respect to the median family income.[11]

EXECUTIVE PAY COMPARISON



Doctoral university salaries taken from "The Chronicle of Higher Education." Think tank salaries represent those with ≥ $10M in assets, labor union salaries represent those with ≥ $100M in assets, public interest groups represent those with ≥ $10M in assets, community foundations represent those with ≥ $250M, public foundations represent those with ≥ $100M in assets, private foundations (family) represent those with ≥ $250M in assets, private foundations (independent) represent those with ≥ $1B in assets, and total average equals the average salary of an executive level officer from the above groups.

These declines in real compensation have real effects. Too many talented people shy away from public service because they have large mortgages to pay, children in college, or other financial obligations that cannot be met on current federal salaries. Too many others enter public service but stay too briefly for those same financial reasons.

It is difficult to generate public concern about the salaries of senior federal officials because those salaries are higher than the average compensation of workers nationwide. But the comparison is not apt. The talent and experience needed to run large and complex federal enterprises are not average. Eighty-seven percent of the people appointed by President George W. Bush in his first year in office had advanced degrees. Most had extensive experience in the management of large organizations. Excellence in government performance requires excellent leadership. We must be willing to pay enough to bring such leaders into public service and to keep them there.

To restore fairness and improve the appeal of public service, we believe appointees' salaries must be raised. They need not equal the salaries of senior corporate executives or even approach those. But they should be on a par with the compensation of leaders in educational and not-for-profit organizations, or even with counterpart positions in state or local government. It is not unreasonable in our view that a secretary of state should be paid a salary that compares with

a university president or that a secretary of education should earn what a superintendent of a large urban school district earns.

Legislative salaries have shown the same general decay as executive salaries. Few democracies in the world expect so much from their national legislators for so little in compensation. Indeed, salaries of members of Congress fall well below the compensation of the nation's top college and university presidents and the executive directors of its largest philanthropic foundations and charitable organizations. We believe that members of Congress merit a salary that is commensurate with comparable salaries in the educational and not-for-profit sectors.

RECOMMENDATION 10

Congress should break the statutory link between the salaries of members of Congress and those of judges and senior political appointees.

Congress has traditionally tied the salaries of senior executive branch employees and federal judges to its own. In 1989 the linkage was set in statute. Given the reluctance of members of Congress to risk the disapproval of their constituents, a phenomenon first seen in 1816, Congress has regularly permitted salaries to fall substantially behind cost-of-living increases and trends in private, educational, and not-for-profit compensation.

We are aware that recent research suggests that pay disparities at the middle and lower levels of the federal workforce may be less significant than previously believed. However, the "pay gap" at the top of the salary structure is indisputable, as are its consequences in lost morale and uncertain accountability. Its consequences are also clear in the presidential appointments process, which must increasingly focus on the relatively affluent or those for whom an appointment represents a dramatic increase in compensation, neither of which is appropriate in itself for public service.

"Salaries do matter.
If you keep cutting and cutting,
you will find the institutional strength
sapped. You will find it harder
to attract and keep people.
The reputation of the agency will fall.
The public will become disenchanted.
It will begin to distrust
the organization. It will lose interest.
As a result, morale within
the organization falls."

Stephen G. Breyer, Associate Justice,
U.S. Supreme Court

We believe that members of Congress are entitled to reasonable and regular salary adjustments, but we fully understand the difficulty they face in justifying their own salary increases. They must answer to the voters when they make such choices, and most of the voters have annual incomes significantly lower than members of Congress. Whatever political difficulties they face in setting their own salaries, however, members of Congress must make the quality of the public service their paramount concern when they consider salary adjustments for top officials of the other branches of government. We believe that executive and judicial salaries must be determined by procedures that tie them to the needs of the government, not the career-related political exigencies of members of Congress.

Although members of Congress have the power to adjust their own salaries, judges and senior executives do not have such power. Under current law, they are at the mercy of Congress when it comes to salary adjustments. That mercy should not be strained by the inherent difficulty of congressional salary decisions. Salaries for leaders of the other branches should be based on the compelling need to recruit and retain the best people possible. Unlinking congressional salaries from theirs is an important first step in accomplishing that.

OPERATIONAL EFFECTIVENESS IN GOVERNMENT

The federal workforce must be reshaped, and the systems that support it must be rooted in new personnel management principles that ensure much higher levels of government performance.

As noted earlier, much of Title 5, the section of the U.S. Code that regulates the public service, was written at a time when government was composed largely of lower-level employees with relatively routine tasks that required few specialized or advanced skills. The principal purpose of much of the substance of Title 5 is to protect federal workers from political influence, from arbitrary personnel actions, and from unfair and inequitable treatment compared to other federal workers. Those are important protections to preserve. But they must coexist with a much broader recognition of the needs of modern agencies to perform missions that are more complex and much more specialized than those of the government for which much of Title 5 was written.

In recent years, Congress has begun to permit some exceptions to Title 5 constraints for agencies facing critical mission challenges or personnel needs.[12] We believe these experiments have demonstrated beyond a doubt that, in the performance of mission-related functions, agencies often benefit when they are liberated from Title 5 constraints. And we believe the results of those experiments should now be extended much more broadly across the government.

The simple fact is that many agencies would perform better if they had greater freedom to design personnel recruitment strategies and define conditions of service, more latitude to assemble competitive compensation packages and align compensation policies with performance criteria, expanded freedom to reorganize to meet emerging needs, and greater authority to use contracted outsourcing when that is the most efficient way to meet mission objectives.

We clearly recognize the risks in some of these new approaches, especially when they are deployed unevenly. In the development of the new Transportation Security Agency, for example, we have seen how greater management and compensation flexibility in one agency can cannibalize others that lack that flexibility. Federal employees act rationally; the best are drawn to environments where their opportunities to advance in their careers and their compensation are affected by their performance. When one agency follows that principle and another does not, employees will naturally be drawn away from the latter and toward the former. That is one reason why we believe it is time to treat these matters as government-wide issues, not

JUDICIAL COMPENSATION:
OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Approved by the Board of Regents
March 2007

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JUDICIAL COMPENSATION: OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Executive Summary

No one can seriously dispute that an independent judiciary is critical to our system of government and to our way of life.[1] The Founding Fathers gave us a system of government with three distinct and independent branches, designed to serve as checks and balances against one another, to ensure our life, liberty, and pursuit of happiness. If our judiciary is to maintain its independence and serve its critical constitutional function, judges must be fairly compensated in order to attract and retain the very best candidates.

Sadly, we do not now compensate our judges adequately. Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%.[2] Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less than many law school professors and a fraction of what most could make in private practice. As a result, good judges are leaving the bench at an alarming rate. Judicial vacancies are increasingly being filled from a demographic that is not conducive to a diverse and impartial judiciary.

Chief Justice Roberts describes this state of affairs as nothing less than "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." The American College of Trial Lawyers joins Chief Justice Roberts – and countless others – in calling for a substantial increase in judicial compensation commensurate with the importance and stature the federal judiciary should and must have. And the College has a specific suggestion for the amount of the increase. We assume – we know – that our federal judiciary is no less important to our society than the judges of the country from which we adopted our legal system are to their native land. Judges in England are paid twice as much as their counterparts in the U.S. We believe that our federal judges ought to paid at least as much as English judges; so we propose a 100% raise from current compensation. At that, our judges will arguably still be underpaid for the service they provide our society, but it is a start.

We recognize that the increase we propose is a substantial sum of money But the cost is a mere 5% of the $6.5 billion federal court budget, and it is a rounding error – one hundredth of 1% – of the overall $2.9 trillion federal budget. It should be seen as a modest, sound investment in an independent judiciary; it is an investment necessary to preserve our constitutional framework.

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1 "Judicial independence" is an oft misunderstood phrase. Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, explained that the term should not be interpreted to mean that a judge is free to do as he or she sees fit but rather that courts need to be fair and impartial, free from outside influence or political intimidation. Chief Justice Randall Shepard of the Indiana Supreme Court puts it thus: "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."

2 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

An independent judiciary is critical to our society; and fair compensation is essential to maintaining that independence.

Of all the grievances detailed in the Declaration of Independence, none was more galling than the lack of independence imposed by King George on Colonial judges:

> He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

Declaration of Independence, July 4, 1776. English judges were assured life tenure during their "good behavior" by the Act of Settlement of 1700, but their Colonial counterparts served at the pleasure of the King. Their salaries were subject to his whims. Judges beholden to the King, not surprisingly, often ruled as he pleased, no matter how unfairly. The framers of our post-Revolution government needed to ensure an independent judiciary.

In 1780, nearly a decade before the U.S. Constitution was ratified, John Adams drafted a Declaration of Rights for the Massachusetts State Constitution, which declared:

> It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The concept of judicial independence – that judges should decide cases, faithful to the law, without "fear or favor" and free from political or external pressures – remains one of the fundamental cornerstones of our political and legal system. As Alexander Hamilton explained, once the independence of judges is destroyed, "the Constitution is gone, it is a dead letter; it is a paper which the breath of faction in a moment may dissipate."[3]

Fair compensation is critical to maintain that independence. In the *Federalist Papers*, Hamilton explained the importance of fair compensation: "[I]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Federalist Papers* No. 79. Thus, the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) life tenure and (2) a prohibition against diminution of compensation.

Inflation is not unique to modern times. The drafters of the Constitution were aware of the problem, and they took steps to solve it. Explaining that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support," Hamilton, in *Federalist Paper No. 79*, observed:

> It would readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations

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3 *Commercial Advertiser* (Feb. 26, 1802) (quoted by Chief Justice Roberts in his 2006 Year-End Report on the Federal Judiciary).

> in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

A case can be made that the Constitution *requires* a raise in judicial compensation to ameliorate the diminution which has occurred over time as the result of inflation.[4] When the Constitution was adopted, the Founding Fathers provided that the President was entitled to compensation which can be neither increased nor decreased during the term of office, while judges were guaranteed there would be no diminution of compensation; there was no ban on increases in judicial compensation, because it was contemplated that there might have to be increases. Hamilton explained:

> It will be observed that a difference has been made by the Convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

Id.

The prohibition against diminution of judicial salaries was not simply to protect judges; it was designed to protect the institution of an independent judiciary and thereby to protect all of us. Society at large is the primary beneficiary of a fairly compensated bench:

> [T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

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4 To be sure, in *Atkins v. United States*, 214 Ct. Cl. 186 (Ct. Cl. 1977), a group of federal judges were unsuccessful in arguing that their rights had been violated because Congress had raised other government salaries to adjust for inflation at a different rate than for judges. The court held that the Constitution vests in Congress discretion in making compensation decisions, so long as they are not intended as an attack on judicial independence. On the facts in *Atkins*, the court found no such attack. But the effect of inflation on judicial salaries over the past 30 years has eroded judicial compensation as effectively as an all-out assault. A court might well reach a different decision on today's facts.

Evans v. Gore, 253 U.S. 245, 253 (U.S. 1920).

The current levels of judicial compensation are not fair; and the inadequacy of those levels is having an adverse impact on the administration of justice in the federal courts.

In the period from 1969 through 2006, the average U.S. worker enjoyed an 18.5% increase in compensation adjusted for inflation; at the same time, the salaries of district court judges have decreased by 24.8%. Over the past 40 years, federal judges have lost 43.3% of their compensation as compared to the average U.S. worker.[5] In 1969, although federal judges earned less than they might in private practice, their salaries were consistent with and generally higher than those of law school deans and senior professors. But by 2007, law school deans and senior professors are, in general, earning twice what we pay our district court judges.[6]

Starting salaries for brand new law school graduates at top law firms now equal or exceed the salary of a federal judge. A judge's law clerks can out-earn their judge the day after leaving the clerkship.

No one can seriously argue that federal judges have not lost ground. At the same time, it must be conceded that a federal district judge's current salary – $165,200 – is a substantial sum to average Americans, the vast majority of whom earn substantially less. But the point is that judges are not supposed to be average. They should be the best of us, the brightest of us, the most fair and compassionate of us. The Founding Fathers knew and contemplated that good judges would be a rare commodity, entitled to the special emoluments of their stature:

> There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that ***there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.*** And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government

5 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

6 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary.*

> can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Federalist Papers, No. 78 (emphasis added).

The fact is that persons qualified to be federal judges can generally command far greater sums in the private sector and even in academia. So the issue is not whether current judicial salaries might seem adequate measured against the wages of a typical American; the issue is whether those salaries continue to attract and retain those relatively few, talented persons we need as judges. Our society cannot afford to have a federal judiciary overpopulated by persons who can afford to serve at vastly below-market rates only because their personal wealth makes them immune to salary concerns or because their personal abilities and qualifications do not command greater compensation.

During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the percentages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.[7] There is nothing wrong with having former prosecutors populate the bench. But too much of a good thing ceases to be a good thing. A bench heavily weighted with former prosecutors is one which may lose its appearance of impartiality and objectivity; and appearances aside, it may actually suffer that loss. It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench.

At the same time that current compensation levels place unacceptable barriers to attracting the best possible candidates for the bench, those levels are forcing sitting judges to rethink their commitments. Over the past several years, dozens of competent, able federal judges have left the bench, many of them making no secret of the financial pressures which led them to do so. In the past few years, at least 10 federal judges left the bench well before normal retirement age; combined, these 10 judges had 116 years left before they reached the age of 65.[8] The cost of losing these able jurists cannot be measured. Put aside the cost of finding their replacements – the cost of locating, screening, and vetting qualified applicants, the cost of training the new judges, the cost to the system as the remaining judges must shoulder the extra workload until a replacement is sworn in – all of these things have a cost to society, some measured in money, some measured in the time it takes for the wheels of justice to turn – but put all of that aside. The real cost is that those 10 judges we identify

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7 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary*, p. 3-4.

8 Judge David Levi has announced he will retire in July 2007; Judge Levi, who has served on the bench for 16 years, is 55. Judge Nora Manella resigned in March 2006 at age 55 after 8 years of service. Judge Michael Luttig retired in May 2006 at age 51 with 14 years of service. Judge Roderick McKelvie resigned in June 2002 at age 56 with 10 years of service. Judge Sven Erik Holmes resigned in March 2005 at age 54 with 10 years of service. Judge Carlos Moreno resigned in October 2001 at age 53 with 3 years of service. Judge Stephen Orlofsky resigned in 2001 at age 59 after 7 years of service. Judge Michael Burrage resigned in March 2001 at age 50 with 6 years of service. Judge Barbara Caufield resigned in September 1994 at age 46 with 3 years of service. Judge Kenneth Conboy resigned in December 1993 at age 55 with 6 years of service. Over the past two decades, scores of other judges have left the bench while still in their prime to pursue more financially rewarding careers.

above, (and scores of others like them) had more than 100 years of prospective judicial experience now forever lost to our society; years they chose to expend in private rather than public pursuits.[9] The loss is incalculable.

A federal judgeship was once seen as the capstone of a long and successful career; seasoned practitioners with years of experience and accomplishment accepted appointments to the bench, knowing that they would make some financial sacrifice to do so, but counting on the sacrifice not being prohibitive. Now, sadly, the federal bench is more and more seen, not as a capstone, but as a stepping stone, a short-term commitment, following which the judge can reenter private life and more attractive compensation. As a long-term career, the federal bench is less attractive today for a successful lawyer in private practice than it is for a monkish scholar or an ideologue. Ann Althouse, *An Awkward Plea, N.Y.Times* Feb. 17, 2007 at A15, col. 1

Chief Justice Roberts is not alone in decrying the current situation. Former Federal Reserve Board Chairman Paul Volcker, as Chair of the National Commission on the Public Service, reported in January 2003 that "lagging judicial salaries have gone on too long, and the potential for the diminished quality in American jurisprudence is now much too large." The Volcker Commission pointed to judicial pay as "the most egregious example of the failure of federal compensation policies" and recommended that Congress should make it a "first priority" to enact an immediate and substantial increase in judicial salaries. Congress, of course, has yet to do so. In February 2007, Mr. Volcker published an opinion piece in the *Wall Street Journal* in which he noted that sad fact. Mr. Volcker, observing that federal judges must possess rare qualities of intellect and integrity, stated that "the authors of the Constitution took care to protect those qualities by providing a reasonable assurance of financial security for our federal judges. Plainly, the time has come to . . . honor the constitutional intent."

The current system of linking judicial salaries to Congressional salaries makes little sense. If federal judicial salaries are to be linked to a benchmark, it should be to the salaries of their counterparts in other countries.

Since the adoption of the *Ethics Reform Act of 1989*, judicial salaries have been linked to Congressional and Executive Branch salaries. Whatever the reasoning that led to that linkage, it is a tie which must now be broken. Certainly, there is no constitutional basis for such a linkage. Judges and members of Congress are equally important to our system of government, but it was never contemplated that judges and Congressmen be equated. The Constitution contemplated that Congress would be composed of citizen-statesmen, who would lend their insights and talents to government for limited periods of time and return to the private sector. Judges in contrast, were and still are expected to serve for life.

But even if it were entirely fair to equate the roles of members of Congress and members of the bench, the linkage would still be unfair to the judiciary. Members of Congress are also underpaid. But members of Congress are limited in their ability to vote themselves a salary increase for the very

9 We use 65 as the normal retirement age, but, of course, federal judges seldom retire at that age, most remain active far longer and take senior status to remain on the bench and contribute for many additional years.

reason that they are the ones who make the decisions. Congress must be appropriately concerned about awarding itself a raise no matter how well deserved because of the appearance of self-interest and the political impact of that appearance. But there is no appearance of impropriety in awarding a well-deserved increase to judges who have no say in the matter.[10]

Because of linkage, political considerations, which necessarily impact decisions about congressional compensation, adversely and unfairly affect judicial compensation. Political considerations should not dictate how we pay our judges. Indeed, we believe that the Constitution was designed to immunize that issue from political pressure.

The federal government already pays myriad individuals far more than current congressional salaries, in recognition that market forces require greater compensation. An SEC trial attorney or FDIC regional counsel can make $175,000 per year.[11] An SEC supervisory attorney can make over $185,000 per year. A CFTC deputy general counsel can make nearly $210,000 per year. The chief hearing officer at the FDIC can make in excess of $250,000 per year; the managing director of the OTS can make in excess of $300,000 per year.[12] The OCC compensates its employees in nine pay bands, a full third of which include salaries with possible maximums in excess of $183,000.[13]

A February 2007 search of the government website posting open positions as of that date returned 343 available jobs with possible salaries in excess of a federal judge's salary; 208 of those postings have salaries in excess of $200,000, 48 in excess of $250,000.

Interestingly, the two countries with legal and constitutional systems most closely analogous to ours, Canada and England, have no links between judicial and legislative salaries; both countries pay their judges at different (higher) rates than other government officials – and both countries pay their judges significantly more than we do. The Canadian counterparts to our Supreme Court justices and federal judges receive salaries approximately 20% greater than U.S. judges:

U.S.	Salary	Canada[14]	Can $	Rate	U.S. $
Chief Justice	$ 212,100.00	Chief Justice	297,100.00	0.863	256,397.30
Appellate Judges	$ 175,100.00	Puisne Judges	275,000.00	0.863	237,325.00
District Judges	$ 165,200.00	Federal Judges	231,100.00	0.863	199,439.30

10 The Constitution left Congress free to vote itself a raise or a salary cut. Almost immediately, at least one of the Founding Fathers thought better of that, and the "Madison Amendment" was proposed in 1789, along with other amendments which became the Bill of Rights. The Madison Amendment would have allowed Congress to increase congressional salaries, but no increase could take effect until an intervening election – which would allow the voters an opportunity to express their displeasure with such a move. But while the Bill of Rights amendments sailed through the original 13 states, it took more than 200 years to obtain the necessary percentage of states to ratify the Madison amendment; it finally became the 27th Amendment in 1992 when Alabama became the 38th state to ratify.

11 For those not conversant with government acronyms: SEC is the Securities & Exchange Commission; FDIC is the Federal Deposit Insurance Corporation; CFTC is the Commodities Futures Trading Commission; OTS is the Office of Thrift Supervision; OCC is the Office of the Comptroller of the Currency.

12 Facts assembled by the Administrative Office of the Courts, February 8, 2007

13 OCC Pay band VII has salaries ranging from $98,300-$183,000; pay band VIII ranges from $125,600-$229,700; pay band IX ranges from $163,100-$252,700. See www.occ.treas.gov/jobs/salaries.htm.

14 Data provided by Raynold Langois, FACTL, Langlois Kronström Desjardins, Avocats, Montréal (Québec).

In England, a Member of Parliament earns 60,277 Pounds – approximately $120,000. A High Court judge, the equivalent of a federal district court judge, is paid 162,000 Pounds, approximately $318,000. English judges make nearly twice what their American counterparts earn:

U.S.	Salary	England[15]	£	Rate	U.S. $
Chief Justice	$212,100.00	Lord Chief Justice	225,000.00	1.964	$ 441,900.00
Appellate Judges	$175,100.00	Lords of Appeal	194,000.00	1.964	$ 381,016.00
District Judges	$165,200.00	High Court	162,000.00	1.964	$ 318,168.00

It is ironic – our forebears split from England and formed our great, constitutional democracy in no small part because of the manner in which King George exerted influence over colonial judges by controlling their compensation; Now, two centuries later, England has provided sufficient judicial compensation to assure the recruitment, retention, and independence of good judges, while we pay our judges less than we do numerous mid-level government employees and recent law school graduates. Our Founding Fathers would find this state of affairs unacceptable. Our judges are at least as valuable to our society as English judges are to theirs. And our judges should be paid accordingly.

A 100% salary increase will still leave our federal judges significantly short of what they could earn in the private sector or even in academia. But such an increase will at least pay them the respect they deserve and help to isolate them from the financial pressures that threaten their independence.

The College is not the first and undoubtedly will not be the last to advocate for a substantial raise for our judiciary. In addition to Chief Justice Roberts and former Fed Chairman Volcker, we join the American Bar Association, which has adopted a resolution in support of increased compensation. We join countless other state and local bar associations who have done likewise. We join the General Counsels of more than 50 of the nation's largest corporations who wrote to members of Congress on February 15, 2007 urging a substantial increase. We join the deans of more than 125 of the nation's top law schools who made a similar appeal to congressional leadership in letters dated February 14, 2007. We join the editorial staffs of numerous publications, including the *New York Times*, the *Detroit Free Press*, the *Albany Times Union*, the *Chattanooga Times Free Press*, the *Seattle Post-Intelligencer*, the *Orlando Sentinel*, the *Pasadena Star-News*, the St. *Petersburg Times*, the *Anchorage Daily News*, the *Akron Beacon Journal*, the *New Jersey Star Ledger*, the *Raleigh-Durham News*, the *Boston Herald* and the *Scripps Howard News Service*, all of which have advocated for salary increases. And we join the signers of our Declaration of Independence in recognizing the need to unlink judicial pay from political considerations. We are not sure we can say it any better than the editors of the *Chattanooga Times*:

> All Americans, of course, should want our judges to be among the most stable of our nation's lawyers, to be well-trained men and women of integrity, dedicated to absolute impartiality in upholding the Constitution and the law – with no political or philosophical agenda for "judicial activism."
>
> And we should pay enough to justify the best.

15 Data obtained from Department for Constitutional Affairs, see www.dca.gov.uk.

Appendix 3

Testimony of Justice Anthony M. Kennedy
before the United States Senate Judiciary Committee
February 14, 2007

Testimony of Associate Justice Anthony M. Kennedy
before the
United States Senate Committee on the Judiciary
Judicial Security and Independence
February 14, 2007

Mr. Chairman and Members of the Senate Committee on the Judiciary.

Thank you for the opportunity to testify today.

The subject of your hearing is "Judicial Security and Independence," matters of interest to all of us who are committed to preserving the Constitution and advancing the Rule of Law. With me today are Judge Brock Hornby of the United States District Court for the District of Maine, and also Chairman of the Judicial Branch Committee of the Judicial Conference of the United States; James Duff, Director of the Administrative Office of the United States Courts; and Jeffrey Minear, Administrative Assistant to the Chief Justice of the United States.

Judge Hornby has submitted a statement on the subject of personal judicial security and financial disclosure. Its conclusions appear to me to be correct, but he is more familiar with the details of your proposed legislation. I am sure he can answer any detailed questions you have.

The subject of judicial independence, and in fact the meaning of that phrase, ought to be addressed from time to time so that we remain conversant with the general principles upon which it rests and to ensure that those principles are implemented in practice.

Introduction

These principles invoke two basic phrases in our civics vocabulary, "Separation of Powers" and "Checks and Balances." We sometimes use these terms as if they were

synonymous and interchangeable. This is accurate in some contexts. In both theory and practice, however, the two principles can operate in different directions, with somewhat different thrusts. The principle of Separation of Powers instructs that each branch of our national government must have prerogatives that permit it to exercise its primary duties in a confident, forthright way, without over-reliance on the other branches. This creates lines of accountability and allows each branch to fulfill its constitutional duties in the most effective and efficient manner. So it is that Congress has the sole power to initiate all legislation, which includes, of course, the power of the purse. The President takes care that the laws are faithfully executed and is vested with the power to pardon. The judiciary has the power and duty to issue judgments that are final. The judiciary, of course, also has life tenure and protection against diminution in salary. These are the dynamics of separation.

Checks and balances, to some extent, have an opposing purpose and work in a different direction. While separation implies independence, checks and balances imply interaction. So it is that both the executive and the judicial branches must ask Congress for the resources necessary to conduct their offices and perform their constitutional duties.

Members of our Court should be guarded and restrained both in the number of our appearances before you and in the matters discussed, in order to ensure that Article III judicial officers do not reach beyond their proper, limited role. When Congress holds hearings to assist in the preparation of its appropriations bills, members of our Court appear with some frequency before the Appropriation Subcommittees of both Houses. Our experience has been that in the hearings of the Appropriation Subcommittees the testimony by members of the judiciary, including members of our Court, has been

a useful part of the interactive dynamic. The questions from Committee members tend to go beyond the limited subject of financial resources. We try not to range too far afield, but we find that our discussions have been instructive for us and, we trust, for the Members of the Committees.

Both here and abroad, students and scholars of constitutional systems inquire about the appearance before Congress by judicial officers on appropriations requests. They are fascinated by it. It is an excellent illustration of the checks-and-balances dynamic. Our request for funds to fulfill our constitutional duty is no formality. The requests and the legal dynamic are real. The process illustrates the tradition arrived at through centuries of mutual respect and cooperation. This tradition requires that the Judiciary be most cautious and circumspect in its appropriations requests. Congress, in turn, shows considerable deference when it assesses our needs. This is a felicitous constitutional tradition.

Mr. Chairman, the request to appear before your Committee gave us initial pause, for our recent custom has been to limit our appearances to those before the Appropriation Subcommittees. We should not put you in an awkward position by frequent appearances, and we think for the most part judicial administration matters should be left to the judges who are members of the Judicial Conference of the United States. Yet because of our respect for you and your Committee, and because of the importance of judicial independence in our own time and in our constitutional history, we decided, after discussion with the Chief Justice and other members of our Court, to accept your invitation. It is an honor to appear before you today.

I

The provision of judicial resources by Congress over the

years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world.

Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects.

Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement.

Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of

freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people.

The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

II

As I have tried to convey, separation of powers and checks and balances are not automatic mechanisms. They depend upon a commitment to civility, open communication, and good faith on all sides. Congress has certain functions that cannot be directed or initiated by the other branches; yet those prerogatives must be exercised in good faith if Congress is to preserve the best of our constitutional traditions. You must be diligent to protect the Constitution and to follow its letter and spirit, and, on most matters, no one, save the voters, can call you to account for the manner in which you discharge these serious responsibilities. This reflects, no doubt, the deep and abiding faith our Founders placed in you and in the citizens who send you here.

Please accept my respectful submission that, to keep good faith with our basic charter, you have the unilateral constitutional obligation to act when another branch of government needs your assistance for the proper performance of its duties. It is both necessary and proper,

furthermore, that we as judges should, and indeed must, advise you if we find that a threat to the judiciary as an institution has become so serious and debilitating that urgent relief is necessary. In my view, the present Congressional compensation policy for judicial officers is one of these matters.

Judges in our federal system are committed to the idea and the reality of judicial independence. Some may think the phrase "judicial independence" a bit timeworn. Perhaps there has been some tendency to overuse the term; there may be a temptation to invoke it each time judges disagree with some commonplace legislative proposal affecting the judiciary. If true, that is unfortunate, for judicial independence is a foundation for sustaining the Rule of Law.

Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must. A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to resist improper influence is essential to the Rule of Law as we have come to understand that term.

Judicial independence presumes judicial excellence, and judicial excellence is in danger of erosion. So at this juncture in the history of the relationship between our two branches my conclusion is that we have no choice but to make clear to you the extent of the problem as we see it, with the hope your Committee will help put the problem into proper perspective for your own colleagues and for the nation at large.

It is my duty, then, to tell you, Mr. Chairman, that in more than three decades as a judge, I have not seen my colleagues in the judiciary so dispirited as at the present time. The blunt fact is that the past Congressional policy with respect to judicial salaries has been one of neglect. As a consequence, the nation is in danger of having a

judiciary that is no longer considered one of the leading judiciaries of the world. This is particularly discordant and disheartening, in light of the care and consideration Congress has generally given in respect to other matters of judicial resources and administration.

The current situation, in my submission, is a matter of grave systemic concern. Let me respectfully suggest that it is a matter Congress in the exercise of its own independent authority should address, in order to ensure that the essential role of the judiciary not be weakened or diminished. You are well aware of threats to the judiciary that history has deemed constitutional crises, such as the Court's self-inflicted wound in *Dred Scott* or the ill-conceived 1937 Court-packing proposal. These were constitutional crises in the usual sense of the term. So too, however, there can be systemic injury over time, caused by slow erosion from neglect. My concern, shared by many of my colleagues, is that we are in real danger of losing, through a gradual but steady decline, the highly qualified judiciary on which our Nation relies. Your judiciary, the Nation's judiciary, will be diminished in its stature and its capacity if there is a continued neglect of compensation needs.

The commitment and dedication of our judges have allowed us to maintain a well-functioning system despite a marked increase in workload. In 1975, when I began service on the Court of Appeals for the Ninth Circuit, there were approximately 17,000 appellate cases filed. By 2005, that number had quadrupled to nearly 70,000 cases. The increase in the number of judges has not kept up. In 1975 each three-judge panel heard approximately 500 cases per year; by 2001, the number had risen to over 1,200. Without the dedicated service of our senior judges, who are not obligated to share a full workload but do so anyway, our court dockets could be dangerously congested. It is essential to the integrity of the Article III system that

our senior judges remain committed to serving after active duty and that those now beginning their judicial tenure do so with the expectation that it will be a lifelong commitment.

Despite the increase in workload, the real compensation of federal judges has diminished substantially over the years. Between 1969 and 2006, the real pay of district judges declined by about 25 percent. In the same period, the real pay of the average American worker increased by eighteen percent. The resulting disparity is a forty-three percent disadvantage to the district judges. If judges' salaries had kept pace with the increase in the wages of the average American worker during this time period, the district judge salary would be $261,000. That salary is large compared to the average wages of citizens, but it is still far less than the salary a highly qualified individual in private practice or academia would give up to become a judge.

Since 1993, when the Ethics Reform Act's Employment Cost Index pay adjustment provision ceased operating as Congress intended, the real pay of judges has fallen even faster. Inflation caused a loss of real pay of over twelve percentage points, while the real pay of most federal employees has outpaced inflation by twenty-five percentage points.

Former Federal Reserve Chairman Paul Volcker has advocated raising the salary of federal district judges to remedy this decades-long period of neglect. His proposal would at least restore the judiciary to the position it once had. My concern is that any lesser increase would be counterproductive because it would indicate a Congressional policy to discount the role the federal court system has as an equal and coordinate branch of a constitutional system that must always be committed to excellence.

It is disquieting to hear from judges whose real

compensation has fallen behind. Judges do not expect to become wealthy when they are appointed to the federal bench; they do expect, however, that Congress will protect the integrity of their position and provide a salary commensurate with the duties the office requires. For the judiciary to maintain its high level of expertise and qualifications, Congress needs to restore judicial pay to its historic position vis-à-vis average wages and the wages of the professional and academic community.

A failure to do so would mean that we will be unable to attract district judges who come from the most respected and prestigious segments of the practicing bar. One of the distinguishing marks of the Anglo-American legal tradition is that many of our judges are drawn from the highest ranks of the private bar. This is not the case in many other countries, where young law school graduates join the judicial civil service immediately after they complete their legal educations. Our tradition has been to rely upon a judiciary with substantial experience and demonstrated excellence. Private litigants depend on our judges to process complex legal matters with the skill, insight, and efficiency that come only with years of experience at the highest levels of the profession.

There are two present dangers to our maintaining a judiciary of the highest quality and competence: First, some of the most talented attorneys can no longer be persuaded to come to the bench; second, some of our most talented and experienced judges are electing to leave it. In just the past year, two of the finest federal district judges in California have left for higher-paying jobs elsewhere, one in academia and the other in the state judiciary. The loss of these fine jurists is not an isolated phenomenon. Since January 1, 2006, ten Article III judges have resigned or retired from the federal bench. It is our understanding that seven of these judges sought other employment. In 2005, nine Article III judges resigned or

retired from the bench, which was the largest departure from the federal bench in any one year. Four of those nine judges joined JAMS, a California-based arbitration/mediation service, where they have the potential to earn the equivalent of a district judge's salary in a matter of months. My sense is that this may be just the beginning of a large-scale departure of the finest judges in the federal judiciary. It would be troubling if the best judges were available only to those who could afford private arbitration.

The income of private-sector lawyers has risen to levels that make it unlikely Congress could use earnings of a senior member of the bar as a benchmark for judicial salaries in anything approaching a one-to-one ratio. It has not been our tradition, furthermore, that highly accomplished, private attorneys go to the bench with the expectation of equivalent earnings. Still, outside earning figures are relevant, particularly if we look at earnings for entry-level attorneys, senior associates, and junior and mid-level partners. These persisting differentials create an atmosphere in which it is difficult to attract eminent attorneys to the bench and to convince experienced judges to remain. Something is wrong when a judge's law clerk, just one or two years out of law school, has a salary greater than that of the judge or justice he or she served the year before. These continuing gross disparities are of undoubted relevance. They are a material factor for the attorney who declines a judicial career or the judge who feels forced to leave it behind. The disparities pose a threat to the strength and integrity of the judicial branch.

The intangible rewards of civic service are a valid consideration in fixing salary levels, but here, too, we are at a disadvantage in recruiting and retaining our best judges. As my colleague Justice Breyer says to me, it is one thing to lose a judge to a partnership in a New York law firm but quite another to lose him or her to a non-

profit position with rich intangible rewards plus superior financial incentives. The relevant benchmark here is law school compensation. At major law schools salaries not just of the deans but also of the senior professors are substantially above the salaries of federal district judges. So if a highly qualified attorney wants to serve by teaching young people, the salary differential is itself an incentive to leave. The intangible rewards of judicial service, while of undoubted relevance, do not overcome the present earnings disparity.

For judges to use federal judicial service as a mere stepping-stone to re-entry into the private sector and law firm practice is inconsistent with our judicial tradition. It could undermine faith in the impartiality of our judiciary if the public believes judges are using the federal bench as an opportunity to embellish their resumes for more lucrative opportunities later in their professional careers.

Conclusion

It is both necessary and proper for Americans to repose trust in the dedication and commitment of the judiciary. And Congress should be confident in assuming that federal judges will continue to distinguish themselves and their offices through all their productive years of senior status. History teaches us that federal judges will strive as best they can to keep their dockets current, to stay abreast of the law, and to preserve and transmit our whole legal tradition. Judges, in turn, should have a justified confidence that Congress will maintain adequate compensation. By these same standards it would be quite wrong, in my respectful submission, to presume upon judicial qualities of dedication and commitment to secure passage of other legislation. Our dedicated judges do not expect to receive the same compensation as private-sector lawyers at the top of the profession. They do, however, have the expectation that Congress will treat them fairly,

and on their own merits, so that the judicial office and our absolute commitment to the law are not demeaned by indifference or neglect, whether calculated or benign.

By your asking us to appear here, Mr. Chairman, and by the example of courtesy and respect you and your Committee have always shown to us, we find cause for much re-assurance. Thank you for considering these remarks.

Mr. BERMAN. Thank you.
Justice Alito?

TESTIMONY OF THE HONORABLE SAMUEL A. ALITO, PRESIDING JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC

Justice ALITO. Thank you very much, Mr. Chairman. Thank you for giving us the opportunity to appear here this morning.

My colleague has studied this problem in great depth. And he has given you the big picture concerning the problem that is being considered here by this Subcommittee. I want to talk about this briefly in much more personal terms.

As Chairman Berman mentioned before, I came to the Supreme Court last January. I had spent nearly 16 years as a Federal judge in Newark, New Jersey. And before that, I spent more than 7 years in the U.S. attorney's office in New Jersey. And I want to focus just on the Federal judges in New Jersey that I knew so well.

I have great esteem for the District Court for the District of New Jersey. It has historically been—and I think it still is—one of the finest Federal trial benches in the country. The judges there have handled some of the most important and the most complex civil and criminal cases in the country. And I think it is instructive to look at what has happened to that court in recent years. I think it illustrates a trend that I find quite disturbing.

I took the year 2000 as a benchmark. In 2000, there were 17 active judges on the district court for the District of New Jersey. Of those 17, 8 are still active. Nine are no longer on active status.

Now, what happened to the nine who are no longer on active status? Only three of those are now on senior status. And that is quite a departure from the traditional practice and one that I think should be cause for concern because senior judges perform a very vital function in our Federal judiciary.

I don't think that our courts of appeals or our district courts could continue to operate the way they do. In fact, I am certain they could not continue to operate the way they do if they were deprived of the services of the judges who elect to go on senior status. As I am sure the Members of this Subcommittee are aware, a Federal judge becomes eligible for senior status on reaching the age of 65 with 15 years of judicial experience.

And over the years, the traditional practice has been for a judge to serve until that time or perhaps a little bit beyond that and then go on senior status. That creates a vacancy that can be filled so that the court will have additional manpower. But the senior judge continues to serve, continues on the district court level to try cases and is available to provide important help to new judges who need some time to learn how to be a judge.

When I was on the court of appeals, I can't tell you how much I learned from sitting with senior judges. One of the senior judges when I joined the Third Circuit had 40 years of judicial experience. And I learned a great deal from him and the other senior judges whom I came to know when I sat with them. And, of course, the senior judges provide manpower that is desperately needed by the Federal judiciary.

So the traditional pattern has been for a judge to serve until becoming eligible for senior status and then going on senior status.

In the District of New Jersey since 2000, as I mentioned, of the nine judges who are no longer active who moved from active status to another status, only three elected to take senior status. What happened to the others? Six left the bench entirely. Two of them did it before they became eligible for senior status. And that is a very dramatic statement, I think, about the desirability of Federal judicial service.

The Federal judicial pay structure is quite unusual. I don't know any other occupation or profession that has a structure like that. If a judge reaches 65 with 15 years of service, the judge can continue to get the judge's salary for life.

But if for any reason, no matter how many years the judge has served, if the judge does not reach that age of 65 with 15 years of judicial service and decides to leave for any reason other than disability, the judge gets absolutely nothing. And this is what these two judges who decided to leave the bench before becoming eligible for senior status decided was in their own best interest.

One had been appointed by President Reagan and had 15 years of Federal judicial service. The other had been appointed by President Clinton and had 8 years of judicial service. One left to become a corporate vice president. The other left to become an attorney with a major law firm.

Four judges became eligible for senior status, reached that point, but decided not to serve as senior judges. Three of them joined law firms. One joined a mediation service. In addition, another judge who had served for a short time as a senior judge decided to leave to join a major law firm in New Jersey. So in total, 7 judges of the 17 who—there were 17 active judges and a number of senior judges in 2000.

Seven judges decided to leave the bench entirely. And they had a total of over 100 years of judicial experience. They did not go off into a retirement in any true sense of the word.

They are people who are in good health. They are vigorous. They are still working hard in the legal profession. They are just not working any longer for the Federal judiciary. They are working in the private sector. They took their experience and their wisdom, and they left the Federal bench.

Let me look at just one other thing. And that is the new judges who have come into that district since the beginning of the year 2000. By my count, 10 judges have joined that court during that time. Five of them were promoted from the position of magistrate judge. Two of them were attorneys with the Department of Justice. Only 2o of the 10 new judges who came in during that time came in from private practice. And this is also quite a departure from what we have seen in previous years.

As my colleague said, I think it is quite important for the Federal judiciary to be representative of the community and representative of the legal profession. It is certainly—I don't mean to—when I speak of the figures of judges who came up from being magistrate judges or Department of Justice attorneys, I don't mean to suggest that is not good preparation. I would hardly say that since I spent my entire professional career before joining the bench as a Department of Justice attorney.

But I don't think we want our Federal judiciary to consist only of people who have prior civil service experience or prior government experience. We want people from diverse professional backgrounds.

So that is what has happened with this court, which I think provides a good illustration of the trends that I see emerging. The trend is more extreme in that court than it is in the country as a whole. But I think it is a harbinger. I think it is a sign of what is coming.

I think we are approaching a very unfortunate tipping point. And if something is not done, then I am fearful that the Federal judiciary that we know and that we have come to depend upon will be fundamentally changed in future years.

Thank you, Mr. Chairman.

[The prepared statement of Justice Alito follows:]

PREPARED STATEMENT OF THE HONORABLE SAMUEL A. ALITO, PRESIDING JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC

Mr. Chairman and Distinguished Members of the House Judiciary subcommittee on Courts, the Internet, and Intellectual Property: Thank you for the opportunity to testify at this important hearing. I am pleased to appear on behalf of the federal judiciary.

Introduction

The Constitution's Framers intended that Article III's provision on judicial compensation would help secure judicial independence. They wrote the Compensation Clause in order to help ensure "complete independence of the courts of justice." One of the grievances against King George III listed in the Declaration of Independence was: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton, in The Federalist, No. 79, stated:

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the Judicial from the Legislative power, in any system, which leaves the former dependent of pecuniary resource on the occasional grants of the latter.

The delegates to the Constitutional Convention of 1787 understood that the judiciary would require persons "of the first talents" and that judicial pay would have to be sufficient to attract such persons.

The Framers' vision was that judicial pay should make judges independent of influence but not independently wealthy. As I will discuss later on in this written statement, I am afraid that today's eroding federal judicial salaries will lead, sooner or later, to less capable judges and ultimately to inferior adjudication. If this comes to pass, the function of our courts as the guardians of the rule of law will be undermined.

A Retrospective

I want to offer a brief snapshot of the federal judiciary. Since I began my judicial service in 1990 on the United States Court of Appeals for the Third Circuit, the workload for appellate judges has spiraled upwards. In 1990, there were 40,982 appellate cases filed. In 2006, 66,618 were filed. As a result, the workload per authorized three-judge panel increased from 787 cases in 1990 to 1,197 in 2006. This represents an increase of over 52 percent. The workload for district judges has increased as well. These caseload statistics become even more startling when one considers not just the number of cases, but their character.

Many civil cases filed in federal courts are complex and protracted, and the very best legal minds are necessary for their adjudication. Similarly, today's criminal cases are also often far more complex than those that dominated the federal docket in the past.

In 1979, Judge Irving Kaufman of the Second Circuit, the first chair of the Judicial Conference Committee on the Judicial Branch, wrote:

> The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and

segregation, school admissions and affirmative action, busing, free speech and political protest, internal and foreign security, the rights of criminal defendants, church-state relations from prayers in public schools to public funding for parochial schools, legislative reapportionment, obscenity, the draft, abortion, the death penalty, women's rights, and ecology. Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality have propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role. Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern judge should be, in the phrase describing Justice Brandeis, a master of both microscope and telescope.

The point is simple, but important: Our system of government requires that federal judges be highly qualified lawyers and that they operate free from extraneous influences. Judges are the central figures in our judicial system. It is in the public interest to ensure that these judges are of the highest caliber, free from the distractions of personal economic pressure, and independent of outside influence.

Yet, we increasingly hear from judges across the country that the discharge of the judicial office is becoming increasingly difficult for them. These judges are being squeezed by ever higher caseloads and other pressures on the one hand and by increasingly inadequate compensation on the other. Both factors underscore the urgency

of responsible curative action this year. Without serious salary reform, the country faces a very real threat to its judiciary.

Real Decline in Judicial Salaries

The real compensation of federal judges has diminished substantially over the years. I want to assure you that I am not overstating the case. Consider the following: Between 1969 and 2006, the real pay of district judges declined by about 25 percent.[1] During this same period of time, the real pay of the average American worker increased by well over 18 percent. In 1969 dollars, the district judge salary would be worth $219,700 today, an increase of $54,500. If judges' salaries had kept pace with the increase in the average wages of American workers during this time period, the district judge salary would be $261,300, an increase of $96,100.

Since 1993, when the Ethics Reform Act's Employment Cost Index pay adjustment provision ceased operating as Congress originally intended, the real pay of judges has fallen behind inflation by over 12 percentage points, while the real pay of rank-and-file federal employees has outpaced inflation by 25 percentage points.[2] Unless this trend is reversed, its damage will be more severe, and more immediate, than anything I have seen in all my years on the federal bench. Unlike other federal employees, judges

[1] *See* Exhibit 1.

[2] *See* Exhibit 2.

do not know, from year-to-year, whether they will receive annual cost-of-living adjustments.

It is disquieting to hear from judges whose real compensation has failed to keep pace with inflation and who are concerned about the financial well-being of their families. Judges do not expect to become wealthy when they are appointed to the federal bench; however, they do expect to receive, in real terms, what the job paid when they took it. This situation threatens irreparable harm both to the institution and to the public that it serves.

Judges' salaries have been eroded by escalating living costs and have severely lagged behind the salaries of other federal employees, as well as their peers in the nonprofit sector, in academia, and in the private sector.

Salary Comparisons with Other Federal Employees

There is another problem. Since the enactment of the Ethics Reform Act of 1989, the salaries of numerous federal employees have been delinked from the salaries of Members of Congress and federal judges. As a result the federal salary structure has become inverted, so that rank-and-file employees may now be paid salaries well above those of constitutional officers.

In recent years, federal departments and agencies with increasing frequency have convinced friendly congressional oversight committees to exempt them from all or part of the pay and personnel restrictions of title 5, United States Code. Stated differently, Congress has already determined to break the link in compensation between employees in

the executive branch and officers and employees in the legislative and judicial branches, whose annual pay is now capped at $165,200. As a result, it is not uncommon now to find federal employees in the executive branch, as well as in the banking and financial agencies, who are paid significantly more than Justices and judges of the federal courts, as well as Members of Congress.

The Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004[3] established a three-component system of compensation for federally employed physicians and dentists, consisting of basic pay, market pay, and performance pay. The aggregate compensation of these employees is capped only by the Presidential salary, which is currently $400,000.[4] *See*, 38 U. S. C. § 7431(e). Following this written statement, you will find a sampling of current job vacancy announcements (from the Department of Veterans Affairs) for physicians. *See* Exhibits 3 – 17. As you will observe, the Veterans Health Administration is currently exercising its authority under title 38, United States Code, to pay physicians up to $275,000 annually.

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[3] Pub. L. No. 108-445.

[4] The term "aggregate compensation" means the combination of basic pay plus "special pay" for factors such as length of service, scarce specialties, board certification, executive responsibilities, etc.

Other federal departments that employ physicians have also been delinked from the salaries of Members of Congress and judges. According to the Office of Personnel Management, the extraordinary pay authorities (for physicians and dentists) that Congress enacted for the Department of Veterans Affairs have been extended (administratively) to the Departments of Defense, Health and Human Services, and Justice.[5] The aggregate compensation of physicians and dentists employed by the Department of Defense apparently now ranges up to $225,000 annually. *See* Exhibit 18. At the Department of Health and Human Services (DDHS), the aggregate compensation of physicians and dentists (exclusive of the Public Health Service) appears to be capped (as a matter of policy) at a more modest $200,000 annually.[6]
See http://ohrm.cc.nih.gov/info_center/Physcians/paypsp.htm; *see also* Exhibit 19 (which shows that a federally-employed pharmacist or scientist at DDHS may be paid up to $200,000 annually). Even the compensation of federally employed nurses and speech pathologists has been delinked from the compensation of Members of Congress and

[5] *See* Office of Personnel Management Benefits Administration Letter (Subject: Change in Crediting Physicians' Pay under Title 38, United States Code), June 12, 2006.

[6] It appears that physicians employed by the Department of Health and Human Services could be paid up to the Presidential salary (currently $400,000).

federal judges. Nurses and speech pathologists who are employed by the Department of the Navy can now be paid salaries up to $200,000 annually. *See* Exhibits 19 to 20.

The salary structure at the Securities and Exchange Commission (SEC) was delinked from Members' and judges' salaries pursuant to the "Investor and Capital Markets Fee Relief Act," Pub. L. No. 107-123. This legislation authorized the SEC to develop a system of pay and benefits similar to that developed by the banking agencies (i.e., the Comptroller of the Currency, the National Credit Union Administration Board, the Federal Housing Finance Board, the Farm Credit Administration, and the Office of Thrift Supervision) under section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (codified at 12 U.S.C. § 1833b).[7]

I have attached, for your information, five job vacancy announcements for SEC positions for which the maximum payable salaries are in excess of federal judicial salaries (currently $165,200). *See* Exhibits 22-26. As you will observe, the SEC recently recruited for two Supervisory Attorney-Adviser, a Trial Attorney, and an Attorney-Advisor. The job vacancy announcements show that the maximum salary payable to the Supervisory Attorney-Advisor is $191,134 and to the Trial Attorney is $175,384. These salaries exceed the salaries of circuit and district judges (currently $175,100 and $165,200, respectively). While these positions are undoubtedly important, it is

[7] Under section 1833b, each banking agency has the discretion to establish and adjust "schedules of compensation and benefits." The only condition is that agency heads are required to keep Congress (as well as their counterparts) informed of their respective pay and benefits packages.

questionable whether the functions performed by their incumbents are more important than those performed by Article III judges, who are constitutional officers and are regularly required to make extremely difficult and important decisions. Indeed, based upon the above discussion, it would be reasonable to conclude that a district judge who presides over an SEC case may be the lowest paid attorney in the courtroom.

In 2002, the FIRREA was amended to authorize the Commodity Futures Trading Commission to maintain pay comparability with the banking agencies referenced above. *See* Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, tit. X, § 10702. I have attached, as exhibits, four job vacancy announcements for positions at the Commodity Futures Trading Commission (including one for a Deputy General Counsel for Litigation) that show that the maximum salaries payable to candidates are well in excess of the salaries of Members of Congress and district judges (currently $165,200), as well as circuit judges (currently $175,100). *See* Exhibits 27-30.

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 authorizes the Office of Federal Housing Enterprise Oversight (of the Department of Housing and Urban Development) to "fix the compensation of . . . officers and employees . . . without regard to the provisions of chapter 51 and subchapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates." *See* Pub. L. No. 102-550, § 1315, 106 Stat. 3941, 3947, codified at 12 U.S.C. 4515. The compensation system at this agency too is linked to the so-called FIRREA (i.e., banking agencies). I have attached as exhibits two job vacancy announcements for positions at the Office of

Federal Housing Enterprise Oversight, which show that the maximum salaries payable to candidates are in excess of the salaries of Members of Congress and judges. *See* Exhibits 31-32. Among other things, this agency is currently recruiting a "Senior Financial Engineer" (i.e., an economist), who may be paid up to $186,251 annually.

The Federal Deposit Insurance Corporation's (FDIC) organic statute provides that the Board of Directors of the FDIC "shall have the power . . . [t]o appoint officers and employees . . ., to define their duties, [and] *fix their compensation*" (emphasis added). Consistent with this independent pay-setting authority, government-wide pay caps do not apply to the FDIC. Congress in enacting FIRREA gave the other financial regulatory agencies pay authority similar to the FDIC's and required those agencies (including the FDIC) to seek to maintain "pay comparability" with one another to avoid competition for employees. *See* 12 U.S.C. § 1819(a). The FDIC currently employs about 5,000 people. About ninety of those positions fall within the FDIC's Executive Management classification band, which is currently capped at the Vice Presidential salary level of $215,700. Another 500 positions are considered managerial and supervisory in nature, and the maximum salary at this level appears to be $169,272. *See* Exhibit 33. I have attached, as exhibits, three job vacancy announcements for positions at the FDIC (including one for a Regional Counsel) that show that the maximum salaries payable to candidates are well in excess of the salaries of Members of Congress and district judges (currently $165,200), as well as circuit judges (currently $175,100). *See* Exhibits 34-37.

Under 12 U.S.C. § 248(l), the Board of Governors of the Federal Reserve System is authorized to appoint employees without regard to the provisions of title 5, United States Code. According to the Federal Reserve Board's website, its employees may be paid an annual salary of up to $178,470.

See http://www.federalreserve.gov/careers/salary.htm (Exhibit 38).

Attached is a chart listing the salaries of the presidents of the 12 Federal Reserve Banks, which range from $249,000 (in Cleveland) to $355,000 (in Boston, Atlanta, Chicago, and Minneapolis). *See* Board of Governors of the Federal Reserve System, 92nd Annual Report to Congress 2005, p. 291. (Exhibit 39)

As discussed above, the FIRREA agencies have long been delinked from the salaries of Members of Congress and judges. For example, the compensation of employees at the Office of the Comptroller of the Currency (OCC) is currently capped at $225,000. *See* http://www.occ.treas.gov/jobs/DEU-HQ-07-030.htm (Exhibit 29). A random search of job vacancy announcements posted on those agencies' websites (as well as http://www.usajobs.gov/) is revealing. *See* Exhibits 41-42.

The Office of Thrift Supervision is currently recruiting for five high-level positions, and in at least one instance an eligible candidates may be paid an annual salary of up to $305,166. *See* Exhibits 43-47.

In 1998, Congress enacted legislation allowing the Internal Revenue Service to fix the salaries of up to 40 key officials at the Vice Presidential salary (which is currently

$215,700). Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206. Similar authority has been granted to the Federal Aviation Administration.

In the 108th Congress, legislation was enacted that restructured the system for compensating members of the executive branch's Senior Executive Service (SES). National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136. Under this legislation, the six levels in the former SES pay scale were abolished and replaced with an open pay range that currently stretches from $111,676 to $168,000.[8] *See* Exhibits 48-49. Members of the SES may be paid anywhere in the above pay range, based on performance, at the discretion of their agency head. This statutory change gives executive branch agency heads unprecedented discretion to set, raise and lower salaries for individual members of the SES based on their relative performance (e.g., their individual performance, their contribution to their agency's performance, or both). This means that any member of the SES may now be paid a salary in excess of the salary (currently $165,200) of a district judge and a Member of Congress.

The 2004 Defense Authorization Act also authorizes the Secretary of Defense to appoint up to 2,500 "highly qualified experts" (e.g., scientists, engineers, and medical

[8] In order for executive branch agencies to implement the new Executive Schedule level II rate of pay for their SES members, the Office of Personnel Management must certify the agency has developed a performance management system that ties executive compensation more closely to job performance.

personnel) for terms of up to six years. These experts may be compensated at rates of pay as high as 150 percent of the maximum Senior Executive Service salary. Pub. L. No. 108-136, § 1101, codified at 5 U.S.C. § 9903. Under this authority, one of these "highly qualified experts" could be paid an annual salary of up to $252,000. *See* Exhibits 50-51.

In 2005, Congress authorized the Environmental Protection Agency (EPA) to make up to five appointments annually from 2006 to 2011 (for its Office of Research and Development) "under the authority provided in 42 U.S.C. 209," which generally provides for the hiring of consultants "without regard to the civil service laws." *See* Pub. L. No. 109-54, tit. II. Under this authority, at least two of these appointees could be paid an annual salary of up to $200,000. *See* Exhibits 52-53.

I should note that this salary inversion negatively affects other judicial officers as well. In many geographic locations within the continental United States, the locality-adjusted pay of nearly two hundred court unit executives (e.g., clerks of court) and their deputies now exceeds the salaries of bankruptcy and magistrate judges (currently $151,984, as set by statutory formula). Nonforeign cost-of-living adjustments (COLAs) and differentials for court unit executives and comparable executive branch officials who are located outside of the continental United States have also pushed their adjusted salaries above the district judge salary.[9]

[9] At present, federal employees in Alaska, Hawaii, and the territories (Guam, the Northern Mariana Islands, the Virgin Islands, and Puerto Rico) receive non-foreign cost-of-

Second National Commission on the Public Service

My testimony would be incomplete if I failed to mention the landmark report, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, in which the Second National Commission on the Public Service (hereinafter referred to as the Volcker Commission) concluded in 2003 that "[j]udicial salaries are the most egregious example of the failure of federal compensation policies," and recommended that "Congress . . . grant an immediate and significant increase in judicial, executive and legislative salaries to ensure a reasonable relationship with other professional opportunities." *See* http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf.

The Commission reached this conclusion after considering the following: (1) the erosion in judges' purchasing power; (2) the unfavorable comparison between federal judicial salaries and the salaries of their peers in other common law countries, (3) the substantial increase in the salaries of professors and deans at the top 25 law schools;[10] and (4) the increase in the rates of judicial resignations and retirements for what appears to be financial reasons.

Private Sector Salaries

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living allowances equal to 25 percent of their basic pay. Section 461 of title 28, United States Code, does not presently authorize the payment to judges of nonforeign COLAs. In the absence of specific statutory authority, judges may not receive this additional form of compensation.

[10] The Commission, in 2003, understood that the average salary for deans of those schools was $310,639. The average base salary of full professors for a nine-month academic year was $209,571, with summer research and teaching supplements ranging between $33,000 and $80,000.

As most judges know all too well from their conversations with current and former law clerks, federal judicial salaries are commonly eclipsed by the compensation of relatively inexperienced associates in large law firms. In February 2006, Senator Dianne Feinstein observed that "[t]oday, partners at major law firms routinely make three, four or five times what federal judges make. Furthermore, first year law school graduates at these law firms make more than experienced Federal judges." 152 Cong. Rec. S1073 (daily ed. Feb. 10, 2006). The compensation of first-year associates is again spiraling upward. *See* Stephanie Francis Ward, "Who Will Pay for Associate Raises: Partners or Clients?," *ABA Journal e-Report*, http://www.abanet.org/journal/ereport/f2raise.html.

Negative Consequences of Eroding Salaries

In his 2006 Year-End Report on the Federal Judiciary, the Chief Justice stated that the problem of judicial compensation "threatens to undermine the strength and independence of the federal judiciary." As discussed below, the federal judiciary is losing some of its best and brightest judges:

Judge David Levi (E.D. Cal.) – Judge Levi, a brilliant trial judge and widely regarded national leader in civil procedure, has announced that he will resign, without any right to a judicial annuity, from the federal bench in July 2007 (at age 55 with 16 years of service) to accept appointment as Dean of the Duke University School of Law.

Judge Michael Mukasey (S.D.N.Y.) – Judge Mukasey was a highly regarded trial judge who presided over the terrorist bombing conspiracy trial. He retired in

September 2006 (at age 65 with 18 years service) and returned to his former law firm, Patterson Belknap Webb & Tyler LLP. *See New York Sun*, July 26, 2006, http://www.nysn.com/article/36714.

Judge Michael Luttig (4th Cir.)– Judge Luttig, who was a former clerk to Chief Justice Burger and then-Judge Scalia and a leading constitutional expert, resigned without any right to a judicial annuity in May 2006 (at age 51 with 14 years of service) to become Vice President and General Counsel of Boeing Co.

Judge Fern M. Smith (N.D. Cal.) – In June 2005, Judge Smith retired (at age 71 with 16 years of service) to join JAMS (a private firm, comprised of former federal and state judges, that provides dispute resolution services). Judge Smith is a former Director of the Federal Judicial Center, the primary training and educational institute for federal judges, where she was one of the primary editors of the Manual of Complex Litigation.

According to its website, JAMS currently counts 21 former federal judges (including Judge Smith) among its mediator/arbitrators. *See* Attachment 1. A similar organization, called FedNet, counts 15 former federal judges among its mediators/arbitrators. *See* Attachment 2.

Judge Paul Matia (N.D. Ohio) – Judge Matia retired from the bench in May 2005 (at age 67 with 13 years of service) to join Porter Wright Morris & Arthur LLP (Cleveland). During his tenure on the federal bench, the judge presided over the highly publicized case of John Demjanjuk, who was ordered to leave the U.S. for

helping the Nazis persecute Jews during World War II. As discussed below, Judge Matia is the third former chief judge in the Northern District of Ohio to step down from the bench to enter private practice.

Judge Robert Cindrich (W.D. Pa.) – Judge Cindrich was a highly respected trial judge, former U.S. Attorney, Public Defender, and judicial law clerk. He resigned, without any right to a judicial annuity, in January 2004 (at age 60 with 9 years of service) to become chief legal counsel to the University of Pittsburgh Medical Center. At the time of his resignation, it was noted that his judicial salary, which was adjusted for the cost of living in only five of his nine years on the bench, was worth about $11,000 less in real dollars than at the time of his appointment to the bench. In stepping down from the bench, Judge Cindrich stated, "[j]udges are supposed to be relatively smart people, so it doesn't take us long to figure out, I'm going backwards." *See Grand Rapids Press*, February 19, 2004, p. A30.

Judge John Martin (S.D.N.Y.) – A well-regarded trial judge and former U.S. Attorney, Judge Martin retired in September 2003 (at age 68 with 13 years service) to become of counsel to Debevoise & Plimpton, LLP. During his tenure on the bench he presided over a large number of high-profile and complex legal disputes, including several major insurance cases relating to the September 11, 2001, attack on the World Trade Center and a 1999 trial involving Con Edison in connection with environmental violations.

Judge Roderick McKelvie (D. Del.) – Judge McKelvie, who was considered an expert in intellectual property law, resigned from the bench, without any right to a judicial annuity, in June 2002 (at age 56 with 10 years service) to join Covington & Burling LLP. During his 10 years on the bench, Judge McKelvie presided over more than 200 patent infringement cases, including more than 30 patent infringement trials. Judge McKelvie also worked to improve the procedures for presenting complex cases to juries, developing model jury instructions for patent infringement cases and the Federal Judicial Center's video for jurors, *An Introduction to the Patent System*.

Judge Sven Erik Holmes (N.D. Okla.) – Judge Holmes was a highly regarded trial judge with significant judicial and congressional staff experience. He resigned from the bench, without any right to a judicial annuity, in March 2005 (at age 54 with 10 years of service) to become Vice Chair, Legal Affairs at KPMG LLP. In reporting on Judge Holmes' hiring by KPMG, the *New York Times* stated that KPMG is hauling in "a big gun." *See New York Times*, Jan. 23, 2005.

Judge Sam Pointer (N.D. Ala.) – Judge Pointer retired from the bench in April 2002 (at age 65 with 29 years of service) to join Lightfoot, Franklin & White, L.L.C. (Birmingham). *See* "Court Set for Life or Death Argument," *Legal Times*, Apr. 15, 2002; *see also* http://www.privatejudge.com/judges.asp. At the time he stepped down from the bench, Judge Pointer was considered to be "among the 10 most knowledgeable people in the United States on class actions." *Id.* Judge

Pointer returned to private practice because his judicial salary failed to keep pace with changes in the cost of living. *Id.* During his almost thirty years on the bench, Judge Pointer presided over the trial or settlement of a wide variety of major class actions, multidistrict, multiparty, and other complex cases including the Cast Iron Pipe Antitrust Litigation, the Plywood Antitrust Litigation, the National Steel Industry Employment Litigation and the Silicone Gel Breast Implant Litigation. He was one of the principal authors of the Federal Judicial Center's *Manual for Complex Litigation*, Second Edition, and he served for seven years as a member of the Judicial Panel on Multidistrict Litigation.

These are just a handful of the judges who have resigned or retired from the bench in recent years. The institutional knowledge and experience these judges take with them is not easily replaceable.

Twenty Article III judges have resigned or retired from the federal bench since January 1, 2005. It is our understanding that seventeen of these judges sought other employment. Six of these judges retired to join JAMS, a California-based arbitration/mediation, where they have the potential to earn the equivalent of the district judge salary in a matter of months. Five judges entered the private practice of law (presumably at much higher salaries). Two judges resigned to become corporate in-house counsels. One judge resigned to accept a state judicial appointment (at a higher salary). Another judge retired to accept an appointment to a quasi-governmental position. One

judge recently announced his resignation to accept an appointment in higher education.

One judge resigned to accept an appointment in the executive branch of government.

The table below shows the number of departures that has grown in tandem with the financial pressure of being an Article III judge:

Time Period	Number of Departures
1958 to 1969	3
1970 to 1979	22
1980 to 1989	41
1990 to 1999	55
2000 to March 2007	48[11]

Of the 103 judges who have left the federal bench since 1990, 79 retired from the judicial office, and 24 departed before reaching retirement age (without any right to an annuity). To our knowledge, 63 of the aforementioned 103 judges (61 percent) stepped down from the bench to enter the private practice of law (including private dispute

[11] Of the 48 judges who have left the federal bench since January 1, 2000, 34 retired from the judicial office and 13 resigned before reaching retirement age (without any right to annuity). Thirty-one (or 65 percent) of these judges entered the private practice of law (including mediation/arbitration). Four judges accepted appointments to other government or quasi-government offices (one in the federal executive branch, two in state government, and one in a quasi-government agency). One judge accepted an appointment as chief legal officer of a not-for-profit institution and another judge accepted an appointment in academia.

resolution firms). Twenty judges sought other employment (e.g., government and quasi-government agencies, academia, and the non-profit sector). This means that 80 percent of judges who left the federal bench did so for other employment and, in most cases, for significantly higher compensation.

It is significant that a substantial proportion of these separations were related to compensation, and that the numbers are on the rise. For judges to emulate the pattern of executive branch federal service as a mere stepping-stone to reentry into the private sector and law firm practice is inconsistent with the traditional lifetime calling of federal judicial service.

A Potential Solution

Paul Volcker, the former Chairman of the Federal Reserve Board and chairman of the Second National Commission on the Public Service, recently advocated raising the salary of federal district judges to $261,000. *See* Exhibit 52. I believe this is a good starting point for discussion.

I believe my earlier testimony (on the potential value of judicial salaries in 1969 dollars as well as my testimony on the compensation of other federal officers and employees) provides ample justification for raising the district judge salary to this level. The entire budget of the Third Branch is two-tenths of one percent of the total federal budget. If judicial salaries were increased by even one-third, the Third Branch budget would still be about two-tenths of one percent of the federal budget.

Some might argue that the nation cannot afford to pay improved judicial salaries at a time when it is facing a budget deficit; however, the real cost of not granting adequate salaries to our federal judges must be calculated, not in today's dollars, but by the drain on our judiciary that will be caused by the loss of qualified, seasoned judges. Judges are not fungible. A new judge cannot be expected to be as efficient as an experienced judge. The early departure of a single judge, therefore, creates a gap in the system that cannot be closed for years.

I hope my testimony to this Committee has been helpful. I come here not as one primarily telling you to recommend more money, but as one suggesting to you that the judges we have are worth keeping. In closing, I hope you will consider the following: (1) Is the current judicial salary fair?; (2) Does it aid in maintaining judicial independence?; and (3) Does the current judicial salary-fixing process improve and not diminish the Third Branch of government? I hope you will agree that our nation must remain committed to recruiting and retaining the highest quality lawyers for its judicial system. Our nation's judiciary enjoys a proud tradition, distinguished by intellectual ability and dedication to public service.

Mr. Chairman, thank you for the opportunity to appear before your Subcommittee today. I would be happy to expand on any of these points now or in the future. Again, the judiciary is grateful to the Subcommittee for examining the problem of the compensation of judges.

Mr. BERMAN. Thank you both.

And I will now recognize Ranking Member Coble for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

And, the distinguished justices, thank you all for being here. I appreciate very much your testimony today.

And, Mr. Chairman, I only have a couple questions.

And you all may not know the answer to this. But I would be interested to know if you know of the Federal judges currently serving, I would be interested to know if many of them expressed concern or complained about salaries during the nomination process. Do you know one way or the other?

Justice BREYER. I can guess. I would guess—I mean, I am guessing like you. It would be an unusual thing to do. Thank you very much for nominating me, but I don't think you are paying enough.

Mr. COBLE. Yes.

Justice BREYER. I mean, if you think that, don't accept the nomination.

Mr. COBLE. That would be my—yes, I didn't mean for it to be such a rhetorical question. But that would be my guess.

Justice BREYER. Yes.

Mr. COBLE. Do you concur, Justice Alito, with that?

Justice ALITO. I think that is fair, yes.

Mr. COBLE. And let me ask one more question, Mr. Chairman.

Gentlemen, I assume it is your fear that if this business of salary is not addressed favorably that you have the fear of judges abandoning the bench.

Justice BREYER. Well, many have.

Mr. COBLE. Or do you think not?

Justice BREYER. Yes, yes is the answer. And what happens in reality in respect to both questions—and this is a reality I am talking about. I am thinking of colleagues of mine in the First Circuit, the district court there. And some of them are older. And they joined at a time—maybe some of them that—one of the older ones joined really, I think, in the early 1970's.

And they said, well, you know, judges know what they are getting into. They are giving up a good salary. But what they think is that their salary won't be cut. That is what they think.

Mr. COBLE. Yes.

Justice BREYER. And then when they discover that year after year it is cut, they feel that is a surprise. And they don't like it. And then sometimes what happens is they might join the bench young, late 30's even, or early 40's. And then by the time they are 50, what about the education of my children. What do I do with college? Now, that is a problem that every American faces.

Many Americans can do nothing about it because they don't have a choice. But judges do have a choice. They could leave. They can go and work at that arbitration firm and do what they love doing and get paid five times the amount. And if your children are there—and maybe they don't get into Harvard. Or maybe they don't get into a school that has all these scholarships.

Do you think you love them any the less? And we all know if that is what is at stake, you say, I am sorry. I loved being a Federal judge. I just can't do it. And that happens. That is not a made up

thing. That is I see it happening, and it happens more and more. And so, the answer to your question is yes, absolutely.

Mr. COBLE. Justice Alito, did you want to be heard on this?

Justice ALITO. I speak to a number of judges. And I was talking to one recently. And he volunteered that he was going to have his resignation letter ready in his desk, and he would send it to the president on his 65th birthday. He would leave immediately as soon as he became eligible.

Mr. COBLE. Well, thank you both, gentlemen.

Thank you, Mr. Chairman.

Mr. BERMAN. Thank you, Mr. Coble.

I recognize Chairman Conyers for 5 minutes.

Mr. CONYERS. This has been one of the most interesting public discussions from this Committee that I have ever heard. And I say that to congratulate both you jurists for coming to the public to discuss a sensitive issue. I am sure it could have been recommended to you just as easily all the great reasons why you should not have been present here today and let others be the witnesses for this hearing.

And so, this remarkable public discussion is a tribute to our system where you both feel that you can come to us and risk talking about this and leave it up to the Congress, and by extension, the American people decide what to do. We have loads of difficult, challenging, dangerous questions to deal with in our existences. But this is so important to us because we have already started the discussion with why the judiciary is so different and so valuable in a democratic system of governing.

The point that impresses me the most is this need for diversity. And diversity is the one thing that is slipping away from us as your salaries continue to decrease over the decades, as you have pointed out. And so, I think there could be no better way for the Congress to begin to inquire into this matter than to have two of our members of the United States Supreme Court join us in opening this discussion and looking at it from all kinds of perspectives the downside and what is good about it.

And what I have taken from your discussions, members of the Supreme Court, is that de-linkage is really a thing of the past. There probably was a time in our history when it could be justified or there was a rationale for it that made sense. I don't think that exists any longer. And it is my belief that more and more of the Members of Congress who will decide this ultimately feel the same way.

And so, we have started off our discussion in as fine a way as possible. And I just wonder if it is not also important to consider that being a member of the United States Supreme Court is the ultimate and the end point of anybody's life that gets to that point. Because if it isn't, then we demean the position of making these historic decisions that determine which way 300 million people go from each day forward.

And for that reason, I think that we have a heightened understanding of what the Supreme Court does, what judges do and how important their contribution is in our system of government. And I am so proud that you two chose to come forward today and put

your experiences and your beliefs before the American people in the fashion that you have. And I thank you so very, very much.

Justice ALITO. Thank you. Thank you.

Mr. BERMAN. Thank you, Mr. Chairman.

I recognize the Ranking Member of the Committee, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Justice Breyer, in my opening statement, I mentioned the Breyer Committee and the recommendations that have come out of the Breyer Committee and the fact that there is a plan that will be, I understand, made public at the end of this year.

Do you see any hope that we might actually see implementation of those 12 recommendations, say, by next year or in a relatively, you know, short period of time?

Justice BREYER. Yes. The answer is yes. I have talked—I went over to the meeting of the chief judges of the circuit. And we discussed this. And they agree with all of them. And the Judicial Conference says we agree with all of them, and we will implement them.

The key to this, I think, is to get the chief judges now and in the future to recognize that they might during the course of their career have one of these controversial matters. And then they have to have the help to treat it properly.

And that means partly technical. It is partly a question of—well, I see Congressman Sensenbrenner is here. And he was very helpful on this. And we went through it. And it will be implemented.

Mr. SMITH. And the fact that these 12 recommendations are relatively or are non-controversial you think will lead to implementation perhaps in 2008?

Justice BREYER. I would think so. I ask Jim Duff, who is here. He says absolutely. He told me before absolutely. And now he is just saying yes.

Mr. SMITH. Okay. Thank you, Justice Breyer.

Justice Alito, appreciate your comments as well.

If we increase the salaries of Federal judges substantially—and I would define substantially as, say, more than $10,000 or $20,000—isn't that going to put upward pressure on a lot of other salaries, be they Supreme Court justice salaries or the vice presidents' salaries or many other public officials' salaries? And if so, do you have any thoughts on how we might address that situation?

Justice ALITO. Well, I would certainly defer to the Members' expertise on that. But as Justice Breyer mentioned, there are many positions already in the executive branch in which the salaries exceed the salaries of district judges. That has already occurred.

And I think what we are recommending is an adjustment of judicial pay so that it is more in line with the trend that has emerged in executive branch positions where I think there has been a recognition that salaries need to be increased.

Mr. SMITH. Right. I am just mentioning that I think there may be additional consequences if those salaries are raised to the $200,000 level, for example, that we will have other considerations to make. And maybe that is just for us to determine what we do with those other salaries as well.

Justice ALITO. I would not think there would be too many outside—that it would have an affect on many salaries outside of the judiciary.

Mr. SMITH. Okay, thank you.

Mr. Chairman, I have a final question for both of our guests here today. And that is I have looked at the individuals who have retired since the beginning of 2005. And my understanding is that there have been 19. And my reading of the reasons that those 19 individuals have retired is that—and we are talking very small numbers here, which, frankly, makes another point about so few people retiring out of 1,200 Federal judges and those on senior status.

But in any case, the way I read those reasons of the individuals who have left since the beginning of 2005 is that twice as many, six, have left within a short time after their pension has vested versus, I think, three who have left to go to positions that would pay considerably more.

And that, in part, leads me to ask you all the question isn't it fair then in the context of raising or perhaps raising Federal judges' salaries to also consider reforming the pension system that goes with that increase in salary.

Justice BREYER. It might. I see the problem.

I think the senior judge system is an awfully good system because there are people who could retire and then they could do nothing or they could go to this arbitration firm and earn $1 million a year. And instead of doing that, if you can keep them, they then act like regular judges. That is, they do the workload and you don't have to create another position and you don't have to have more and more judges. So there are a lot of virtues to it.

And so, you say suppose we look at it carefully. Is there room? I am not going to say there isn't room because I don't know it perfectly. But I do think it is a valuable thing.

Mr. SMITH. I agree with how valuable it is to have judges on senior status. My point was that it looks as if there may actually be a reverse incentive here. And that is to say, when the pension vests and the judges get full pay in their retirement, it looks like more individuals are taking advantage of that within a short time after that pension vests than are actually leaving the bench for higher paid positions.

Justice BREYER. I see.

Mr. SMITH. And therefore, I think that that might justify looking at the pension system and thinking about reforming that in addition to raising the salaries of Federal judges.

Justice Alito?

Justice ALITO. The pay structure for Federal judges is very unusual. It is certainly true that upon reaching eligibility for senior status or retirement a judge has a pension, so to speak, that is in relation to the salary the judge was getting when on active status, much greater than the vast majority of people do when they get a conventional pension.

But on the other side, you would have to take into account that there are no survivors' benefits unless the judge pays for those himself or herself. And so, a judge with dependents has to take that into account during his or her judicial career.

Mr. SMITH. I understand. I think we ought to take a look at the whole package.

Justice Breyer?

Justice BREYER. You could. You could. I notice the—because I checked on it to see. I pay about—before taxes, I probably pay—and probably the Federal district judge, who this is really about, probably pays about 3.5 percent of the pre-tax salary, so that if the judge dies, his or her spouse will have a pension. You probably pay more than that because you are——

Mr. SMITH. Yes. Sure.

Justice BREYER. So there is a difference in that.

Mr. SMITH. Okay. Thank you all for your answers.

Thank you, Mr. Chairman.

Mr. BERMAN. Just two housekeeping matters.

One, I want to make it clear that any Member who had opening statements—unanimous consent that those statements will be included in the record.

And now to proceed with the questioning, which is going in the order of seniority on the Committee, since I didn't say otherwise at the beginning, the gentlelady from Texas, Sheila Jackson Lee?

Ms. JACKSON LEE. Good morning.

Let me thank our Chairman for what the full Committee Chairman indicated. Those of us who are lawyers certainly enjoy thoughtful discussions by our jurists. And particularly being reminded of my law school days, the constitutional law class and reading those opinions make your presence here today even more edifying. And I thank you so very much.

I want to make a commitment personally as a Member of this body that this is the Congress, the 110th Congress—it has a certain ring to it—that we really need to finish the job. And I think your thoughtful remarks will help to contribute to that.

And I want to just raise a series of points and raise possibly a response. It has come to my attention that the head of state of Singapore has a compensation of about $1 million. And I think the plight that we all face, both the congressional aspect, which is certainly more political and the jurists is that congresspersons and others make decisions that you disagree with, you don't want the best for them. You want the worst.

If the Supreme Court goes your way or against your way, many times you don't want the best. You want the worst. So we are subjected to external assessments that provide additional pressures for really not answering the question of crisis in compensation. That is simply what we have.

If we look at the many attempts—and I do think that de-coupling does not help anyone. I do think an increase in compensation and a trigger on the COLA would be reasonable. And my colleagues will have an opportunity to ask questions. We want it further up than $20,000 or $30,000. We think that the numbers can go higher than that.

But one of the issues that plays is the legislative process of amendments. And I notice in the Hatch legislation that was offered in 2004 we were moving along, and then we got a television amendment, television and a courtroom amendment. And that certainly is a problem.

But what it does is it triggers a failure. And that can be part of this process going forward.

Justice Breyer, what I want to know—I know the thoughtful 12 points that you have in the Breyer Commission you indicated will be going forward. But what is the educational aspect that goes along with making this serious step of finishing the job of getting this compensation crisis addressed? Because each time we go forward, there can be you are on your side of the bench, table. I am on my side, but you know that there will be any number of amendments.

Those amendments we call them in this side poison pills. And it doesn't get us anywhere. I think a thoughtful process, which Chairman Berman has now started—and I thank him—goes a long way. But if we don't jump the hurdle of educating the, if you will, pressure points—and let me make this one statement before I ask for you to respond.

I think our salaries are under more transparency. You just got through saying what you spend for retirement. You just publicly made that statement. Someone will criticize us and say, you know, we are trying to be corporate executives with compensation. Those packages in most often—except for a bill we debated yesterday—those are personal, private packages.

The golden parachutes are private packages. We are transparent. And I say to the public we will be even more transparent. But we have got to address the question of the crisis in compensation and the excellence that our public deserves.

Would you respond to this educational aspect to getting the job done on this point?

Justice BREYER. I don't think it is easy at all. I think you do. That is why I went into the matters I did. I think you have to say to a person, admit it, that you don't know what the exact number is. There is no way to know. But you do know this. Think of your being in a courtroom. And suppose you are one of the least popular people. You are not.

I mean, suppose a person were the least popular person in the United States. Who do you want up there? I know he is making more money than you. I know she is paid a lot more. But whom do you want to have make these decisions that affect you so much?

And maybe if you repeat that enough and you can get people to listen to that and, you know, all these numbers, I think, pale in significance. Do you know who noticed this as interesting? I was reading it. De Toqueville in 1840, he says, "My goodness," he says, "look what they pay Members of Congress." He says that. And he was comparing it to the king of France, by the way. But he said the problem is that, just what you said, you have to help people understand it is their government. And pretty much they will get what they want. And I say here in this—and I was thinking of the other part of the executive branch.

I have a—I looked down here. I have a cardboard box like this that is filled with pieces of paper, each one of which represents somebody over in that executive branch who is being paid a lot more than you or than the Federal judge. And I say, well—you say, you show them this and say, "Look at the comparisons." You can show them the comparison over time.

But ultimately, it comes down to well, what do you want by the way of a public servant? And if you don't want it, you won't get it. But you should want it. And I know it is self-interested, but we believe that with our heart. That is the——

Ms. JACKSON LEE. Thank you very, very much, both of you, for your testimony today.

Mr. BERMAN. The gentleman from Wisconsin?

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I think both of our distinguished witnesses know that I do not favor de-linkage between congressional and judicial salaries and thus will be the skunk at the lawn party. And since both justices have a great reputation for asking tart questions from the bench during oral arguments, perhaps I could take a page out of their book.

I was in the Congress when section 140 of Public Law 97–92 was enacted. And the reason it was enacted is that a year before that Congress killed a COLA within hours or days after the effective date, but before anybody got a pay raise as a result of that. And a retired Federal judge saying that the killing of the COLA for the judicial branch violated the compensation clause of the Constitution. And lo and behold, the judges decided that it did. I don't know if it went all the way to the Supreme Court, but I believe that it did.

I am one of those that believes that when you are dealing with constitutional officers of the government in all three of the branches—and you and we are—there should be some type of comparability in compensation since the branches are separate and coequal. And as a result, the district judges salaries are tied to our salaries, and the Cabinet and the appeals court salaries are a little bit higher. And the Supreme Court salaries are a little bit higher than that.

And that was as a result of a study of compensation commissions that we had in the decade of the 1960's, 1970's and 1980's. Now, by breaking the link, I guess one is saying that there should not be comparability of salaries. I believe that I believe that. And I think that most of the American public does.

And I think the real question that has to be answered is not whether you deserve more pay or you don't deserve more pay, but are the duties and responsibilities and time involved in discharging the duties of a Federal district judge worth that much more than the duties, responsibilities and time involved in being a Member of the House of Representatives or a United States Senator.

Your Honors, the burden of proof is on you. And you can use the rest of the time to try to meet the burden.

Justice BREYER. My answer to your question is no, of course, they are not. But that is why I said that at the end.

I didn't say—and I don't think that our job is less, more important or less important to the American public than yours or the president's, certainly, or the executive branch. And I haven't really said very much about linkage. And I don't particularly—in a way, that is in your bailiwick. It is not for me to say.

And what I say about that is look at the consequences for our institution, not of the—it is not a consequence of the linkage. It is

a consequence of the failure to keep the judges' salaries up with the average Americans' salaries. That is the cut, cut, cut.

And if you say that that is true of Congress, too, fine. I don't disagree with that. I agree with it.

Mr. SENSENBRENNER. Yes, with all due respect, Justice Breyer, since Wisconsin does not have a Republican senator for the last 6 plus years, I have been the gatekeeper for judicial nominations from my State that have gone to the White House. And there has been one district court vacancy and one vacancy on the Seventh Circuit. But let me say that there have been no lack of applicants for either of those positions.

And I spent quite a bit of time interviewing them, even though we do have a commission in Wisconsin. And most people were quite eager, perhaps, to take a pay cut to become a member of the Federal judiciary. So we don't have that problem either with Members of Congress. Every election there seem to be a lot of people who want our jobs, particularly if there is no open seat.

But it seems to me that, you know, you hit the nail on the head right, is that there ought to be comparability in salaries. And I believe that we ought to debate whether or not there should be a pay raise for both the judiciary and Members of Congress. People can vote yes, or people can vote no.

But if you break the tie, then you are saying that one branch's responsibility and time spent is worth more than an equal branch. And I don't think that is what Madison and Hamilton had in mind.

Thank you, Mr. Chairman.

Mr. BERMAN. If I could just simply interject at this point, Justice Breyer, I do have to disagree with you. I think a direct consequence of what has happened to the judiciary in terms of salary is a result of the linkage. But more on that later.

Justice Cohen?

Mr. COHEN. Thank you, Chief Justice Berman.

Justice Alito and Breyer, it is an honor to be here and have you all testify. It is an unusual circumstance.

Justice Alito, you talked about the folks in the New Jersey bar who have gone away from the judiciary. Do you believe over these last 35 years or so—we have talked about the salaries—that there has been a decrease in the quality of the people who have applied to be on the bench because of the salaries?

Justice ALITO. I cannot say that there has. I think it is the court that I know—the court in New Jersey—and the other courts are still of a very high quality. But I agree very much with the way my colleague phrased it in talking about the forest service and talking about the foreign service. If you keep cutting salaries year after year after year, you may never be able to find the year when you can say at this point there was a decrease in quality.

But surely, over time that will happen. There will be a decrease in quality. And there will be a demoralization of the judges who are already on the bench. I think it is true that nobody takes a judicial position with complaints about pay in mind.

But it doesn't take very long sometimes after going on the bench before a demoralization sets in. The judge begins to wonder how the judge is going to be able to pay for college tuition and other

things on a judicial salary. And it has an affect on the way in which judicial duties are performed.

Mr. COHEN. I would think that the argument about the forestry service might be better than the deans of law schools. I think probably they are more important, for one thing. But also they don't have to raise money. The deans of law schools who make way, way, way too much money—they have to raise money like the 501(c)(3) executives do, which you all don't, which is a wonder. We have to do it. It is an awful thing to do.

Yes, sir?

Justice BREYER. I thought it because this is also—your Committee, I know—the Subcommittee is very interested in intellectual property. And one thing that I——

Mr. COHEN. That some would suggest there is a dirth of it up here.

Justice BREYER. Well, one of the consequences, one of the consequences——

Mr. BERMAN. Could you amplify that?

Mr. COHEN. I would rather not. I guess I shouldn't have gone there.

Justice BREYER. If you have a judiciary that is primarily, as it is now, made up of people who have come through this route of, say, assistant U.S. attorney or public defender, whatever, a magistrate, State court judge, you find fewer and fewer who have the intellectual property background. That is why I talk of diversity in a lot of respects.

And you will find—which we are finding—and you ask people—you could ask them. I bet they would testify in front of you. Ask these firms and lawyers interested in intellectual property where are they going to get their disputes settled. They are going to arbitration. And you say, well, okay, so what.

I would say yes, but the arbitrators don't make the rules. You see. And so, they are out there without—it is very complicated, as you know. I don't have to tell you that. I mean, you start talking about patents. You have the creation incentive. You have the dissemination need. You have people looking through thousands of old applications. And you have computers and intellectual—you know, you have everything under the sun. And it is very, very complex.

And it is hard for judges to handle, very hard. It is hard for you. It is hard for any of us. And you start removing any possibility of having that expertise on the bench, that is just one area where everyone will run to arbitration. And this very important legal area will discover itself without the necessary governing rule.

I mean, that is the kind of thing I look at when you start talking about, well, who is really on the bench.

Mr. COHEN. Throughout in my opening statement, which an idea of maybe keeping the salaries coupled, but having the judicial salaries be 30 percent higher than the congressional salaries. Thirty is not a magic figure. Twenty, 25, 35 gets more magical, I guess, to you all. Is that something that you could find substance——

Justice BREYER. Yes, I mean, what I do in my mind—the simple rule of thumb that I—really for the last 20 years I have had it in my mind is this. I have said to myself, look, the rule is supposed to be no diminishment of compensation. Let us keep it real, and let

us say the compensation should stay the same compared to the average American that it was when I took office.

That is what I think most judges would say. And Madison said that. And Hamilton said there shouldn't be any real pay cut. And moreover, if the country gets richer on average, the judges should benefit from that, but no more than the average American benefits from it. So I keep that as that rule of thumb.

And that is why I put it in as the first graph. You know? There is the first graph. And I wouldn't compare it to Congress. And I wouldn't compare it to some other group. I wouldn't compare it to anybody. I would say just let us keep that number steady.

Mr. COHEN. Thank you.

Justice BREYER. That is how I look at it.

Mr. COHEN. I yield the balance of my time.

Mr. BERMAN. I thank the gentleman.

The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman. And thank you for holding this hearing.

And, Justice Breyer and Justice Alito, welcome. And it is an honor to have both of you with us. I know Justice Breyer quite well. And I have not met Justice Alito before. But by reputation and his work on the court I have great respect for him and for both of you.

I also am very concerned about de-linkage. And I think a lot of questions remain unanswered. You have raised some interesting ones here today.

I would first start by saying that I think that every member of the Federal judiciary is underpaid. I don't argue that one bit. But I think it is the nature of public service that you are always going to be underpaid no matter what we do to resolve this issue in comparison to those who practice before your court and the lesser courts simply by virtue of what they can do in the private sector.

I mean, this is an issue that is enveloping the whole country. It has been pointed out repeatedly here in the Congress that the compensation of the highest officers in America's corporations is many, many more times as much as the average worker than it was a number of years ago. And you are suffering from that same comparison when you talk about members of the bar and the compensation that they receive as well.

But I share your concern about diversity. You noted that an increasing percentage of members of the Federal judiciary have already served in State and local judicial positions before moving up. However, I think that raises a lot of questions about the reason for that. And it may or may not be compensation.

It is true that the compensation in the Federal courts is generally quite a bit higher than that in the State courts. But it is also true that the process by which one goes through to become a Federal judge has changed in its character over time. And it may well be that presidents, be they selecting conservative judges, liberal judges, moderate judges, whatever their ideological mindset might be. It may well be that presidents have decided that it is easier and safer to choose a judge to promote than it is to go into the private sector for a couple of reasons.

One, the judge has a judicial record already that can be examined to determine what type of judge they might be in the Federal court. Another is that judges are under a certain amount of scrutiny at any level. And that scrutiny assures that some of the problems that arise with the sometimes very appropriate, but sometimes very nitpicking and unfair questions that judges are asked when they are confirmed by the Senate cause presidents to nominate people who are already judges.

Now, the question then becomes what is the pool that the presidents are choosing from. Is it a larger pool of judges? Or is it still a very diverse pool?

I would argue that it is probably still a very diverse pool. And we ought to look to other reasons why that diversity is not occurring on the court.

The diminishment of compensation—obviously a very, very accurate consideration. And the constitutional mandate that your compensation not be diminished is a certainly important consideration. But when one goes back to look at the compensation of judges at the beginning of our country, one has to look at the quality of life and standard of living they enjoyed.

And no Federal judge today lives a lesser quality of life than the best judge at that time because of the simple fact that our society and economy has evolved and the technology has evolved to provide a much, much better way of life in terms of almost anything you look at from health care to education to the quality of the homes people live in and so on. It has all changed. So I am not sure there is a constitutional violation by not having increased pay based upon rates of inflation.

And finally, I have looked at the list that you have provided of other folks primarily in the executive branch who have been paid more than members of the judiciary, Members of Congress, Cabinet members and so on. And obviously, it is a little disconcerting. But it also is very understandable.

They are overwhelmingly doctors. And the second largest group by far are lawyers. The doctors serving in V.A. medical hospitals do not have the same kind of changed environment moving from a private medical practice where they make many, many times sometimes more money than they do even at these higher salaries than the Federal V.A. hospitals and other similar hospitals. But they also do not enjoy any significant change in their circumstance.

A lawyer becoming a judge, as was noted by the gentleman from North Carolina, has a very different set of circumstances in terms of being on the bench, presiding over and having at their command a host of people that are at their service to make sure that justice is provided. So I have a great respect for what you do and a great understanding for the dilemma that you find yourselves in and the Congress finds itself in. But I also believe that this needs to be examined much, much more closely.

There are many questions. I may submit some to the Chairman to see if he is interested in having the Committee look into trying to get answers to them. But lots of unanswered questions before I would be willing to say that the judiciary should surge ahead of the executive branch or the legislative branch in terms of compensation.

I thank you, Mr. Chairman. I know I have used up all my time. If they care to respond, I would certainly welcome it.

Justice BREYER. I will say one thing. It is interesting what you say. And I know our special interest in this, which has been the foreign law. And on that, two things you might want to look at. And one I mean—I mean both quite seriously actually.

What worries me is that our judiciary becomes like the French, Belgium, continental style system. And that is an administrative system. They are fine people, fine judges.

The other thing that might interest you to look at in respect to what you are talking about with Congress and the linkage and so forth is both in Britain and in Canada they have tried what they call reverse linkage. That is to say they focus on what the judges you say, well, it might come to the same thing. Maybe it does. But the difference is they have really kept up with inflation, indeed, kept up with the increase in the average standard of living and sometimes gone ahead of it for all the branches because it has been keyed to the judges.

Mr. BERMAN. We are going to have a vote very soon. You don't make enough to have to come back here after we are gone for two votes.

So I recognize the gentleman from California, Mr. Schiff. And keep in mind those bells will be going off soon.

Mr. SCHIFF. Thank you, Mr. Chairman.

You know, at the outset I wanted to state what may be the obvious, which is, much as I am a supporter of increasing judicial salaries, this is not a popular cause. The only people that have ever come to lobby me to raise judicial salaries are judges and State bar presidents who want to be judges. The rest of the public never raises this issue. It is not on the radar screen.

There is only one thing, in fact, less popular than raising judicial salaries, and that is raising legislative salaries. And as we don't enjoy the same life tenure that you do, raising our own salaries can be very problematic, which is one of the reasons why I don't support linkage at all.

I think Mr. Sensenbrenner gives the most articulate case in favor of linkage that I have ever heard. It is not the case I usually hear made for linkage, which has more to do with Members' hopes that somehow we can bootstrap a salary increase for Members of the legislature with members of the judiciary. But I have never found an appealing argument to the public to say we have to increase congressional salaries so that we can increase judicial salaries.

That doesn't seem to be very effective advocacy. So I don't think the linkage has served us well. And I from Los Angeles and the judicial community know judges who have left the bench to become private arbiters or go back to private practice who have looked at things that in the past Federal judges would never have considered, have left the bench to go to the State court.

I mean, it is really quite extraordinary when you have a situation, which I am sure is going to be true of all your law clerks who will leave and in their first year in private practice make more than you are. So, you know, I think to keep a strong judiciary, to get the very best people on the bench we have to make a change.

I am intrigued by something that Mr. Smith raised that I wanted to ask you about. And I ask the question, you know, as someone who is a firm believer in de-coupling and in raising judicial salaries. He raised the issue of pensions. And I am hopeful—I hope it is not misplaced. I am hopeful that this year and this session is the year that we will raise judicial salaries.

There may be a question about whether to raise salaries by X amount or raise salaries by less than X—or raise salaries by more than X but at the same time making changes to the pension system maybe to deal with the inverse incentive that Mr. Smith raised.

And I wanted to just get your impression. I know you can't speak at this point for all the judges, but how you think judges would feel about, for example, you know, phasing in the level of the pension over time so that we don't have a strong incentive the year you retire to retire early.

Give judges a stronger salary on the front end and throughout their career on the bench, but have a retirement structure that is phased in to keep judges on the bench longer and also to make a public case for something that is not terribly popular. To say we are raising judicial salaries but making reforms and in some ways, reducing judicial pensions makes it a more saleable legislative work product.

So I would be interested to know your reaction to that. I would assume because of the constitutional provision that the current bench would be grandfathered in terms of their pensions, maybe not only because they are vested, but because of the constitutional provisions. So it would have little downside to the sitting members of the bench.

But thinking in terms of the judiciary's institution, would the judiciary be well-served by that kind of a package?

Justice BREYER. I don't know what you will get from me at this moment because I haven't thought it through. When I listen to it, it sounds like it might. I think there the question is in the details. And it doesn't strike me as something you would rule out. And I think it would be a question of how you did it and what the details were.

That is my own off-the-cuff reaction. And you are asking off-the-cuff, which is dangerous for me to answer off-the-cuff.

Mr. SCHIFF. Yes, I am. I won't hold you to it then.

Justice, do you have any other thoughts?

Justice ALITO. Well, my answer would also be off-the-cuff, and it would be purely personal. But I have long thought that the Federal—that the salary structure and retirement benefits, so to speak, for article 3 judges are very strange and that the structure and pension benefits for non-Article 3 judicial officers, magistrate judges, bankruptcy judges were more in line with general practice and made more sense.

Mr. SCHIFF. My time is expired.

Thank you, Mr. Chairman.

Mr. BERMAN. If I recall, part of the logic was to incentivize those people who are past their prime to leave gracefully. Having reached the age I am now at, I think we didn't quite evaluate what past the prime meant.

Mr. Keller?

Mr. KELLER. Thank you, Mr. Chairman.

I want to thank Justices Alito and Breyer for being here.

I have heard your testimony today and also read the recent comments of Chief Justice Roberts. The gist of your arguments collectively, the three of you, can be described in my notes as these three: First, the current pay for Federal judges is unfair. Second, you have concerns that some judges may leave. And third, you have some concerns about attracting good people from the private sector in the future.

And I remain open minded on all three and wanted to hear everybody's questioning of you. But to play the devil's advocate a bit, there is going to be people watching this at home on C-SPAN, and I am going to ask you the questions that is probably on their mind, if you don't mind, and then give you a chance to respond.

So first on the unfairness issue—Supreme Court justices make $203,000 a year. Judge Judy makes $28 million a year. Life ain't fair. The Supreme Court writes landmark opinions like *Marbury v. Madison*. Judge Judy wrote a book called, "Don't Pee on My Leg and Tell Me It is Raining." Life isn't fair.

Chief Justice Roberts makes $212,000 a year for presiding over our most important cases. Simon Cowell makes $43 million a year for judging Sanjaya. Life isn't fair. Collectively, Justices Breyer and Alito make about $406,000 a year. The Olsen twins made $40 million last year. Life isn't fair.

Here is the point. Any taxpayer-funded occupation will never be a route to wealth. And that is true whether it is a teacher, a firefighter, a police officer, a judge or a senator. It is not fair, but it is reality. And we all know the reality going into these positions. And Federal judges, like Members of Congress, make more money than 95 percent of the population.

So, Justice Breyer, would you agree with me that while judges in the Federal bench should make more, it is unrealistic to expect that Federal judges be paid an amount that is commiserate with what they would make in the private sector?

Justice BREYER. I have never even in my most fanciful dreams dreamt I would earn Judge Judy's salary. [Laughter.]

I think absolutely correct is your answer.

Mr. KELLER. Okay.

Justice BREYER. And I would add only one other thing, that, don't compare the Supreme Court in this. I mean, for one thing, we are old. I hate to tell you. He is not. But our children are educated. And to be a Supreme Court justice, lightning has to strike twice.

Mr. KELLER. Right.

Justice BREYER. And it is quite a special thing. And if it were a matter of only our salaries, I don't think there is one person that would be here.

Mr. KELLER. Okay.

Justice BREYER. We are talking about the Federal district judge, the Federal court of appeals judge. And there what they have seen is, as I say, not just what the level is. I agree with you. Life isn't fair in respect to compensation, particularly and a lot of other things besides. But it is the down, down, down, down over the course of—you can do it 5 years, 10 years, but then it becomes 15. It becomes 20. It becomes an entire working lifetime.

And it is that, the continuous erosion compared to the average American that begins with the demoralization. And then just it doesn't quite have that edge. And then you worry about—you see, it is all that snowball. And it eventually changes the institution.

Mr. KELLER. And, Justice Breyer——

Justice BREYER. And that is what we are worried about.

Mr. KELLER. I hate to interrupt you because I want to ask you a couple more things.

And, Justice Alito, before you respond to that, Justice Breyer has testified he is not articulating a specific position today on the de-linkage issue. Are you articulating any specific position on de-linkage?

Justice ALITO. No, I am not. I agree with what he said. I certainly think that what Members of Congress should be paid is separate—is a matter for you to consider.

On Judge Judy, I would just say this. My mother religiously watches Judge Judy almost every afternoon. And she thinks that Judge Judy does a much better job than we do and deserves more money.

Mr. KELLER. Let me just ask my second question because I am running out of time. And I have nothing against Judge Judy, by the way. So please don't send me letters out there.

The second issue—you are concerned about people leaving. Let me play devil's advocate. And I am going to stop and let you answer both questions. And again, I am open minded, but I have got to ask you this.

There are approximately 1,200 Federal judges on the bench, including those who are in senior status. We are losing on average about six judges a year over the past 6 years according to a recent report from Chief Justice Roberts. That means approximately 99 percent of the judges are staying and not leaving.

Justice Roberts has called this a constitutional crisis. Justice Alito has said today he is worried that there may reach an unfortunate tipping point. And Justice Breyer said you are worried this may be a stepping stone for other jobs.

In light of the great retention rate, is this really a crisis? And, Justice Breyer and then Justice Alito, and then I am out of time.

Justice BREYER. Well, if you say 10 less last—I think it was—you know, I see 21 people over at the arbitration, Federal judges who have given up their job to do that. And you say is that a lot or a little. And you say it is just a little because there are so many others. I say it is a lot. And the reason I say it is a lot is it is maybe age. But when I was in law school and in most of my career, it was unheard of, unheard of.

You couldn't say never, but that a Federal judge, a Federal district judge would leave in order to take a better paying job in the arbitration. I mean, you know, sometimes that would happen. But my goodness. And that is why it is the examples, and it is the growing numbers, and it is the threat of even higher numbers that makes me think if I hear that word stepping stone—and it can be so subtle.

It can be so subtle that no one even admits it to himself. When I hear stepping stone or think stepping stone instead of capstone,

then you get the reaction, which is just the one you heard today. And it is really what brought us over here.

Mr. KELLER. Justice Alito, do you want to respond to that?

Mr. BERMAN. I think we have to——

Justice ALITO. Okay. All right.

Mr. BERMAN. I am sorry. Unless you are urgently needing to respond, I recognize the gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. And thank you for holding this hearing.

I don't have a huge number of questions. I would just like also to thank our colleagues from California, Mr. Schiff, and Congresswoman Biggert for their efforts in putting together our group that interfaces with the judiciary. I have participated on a number of occasions. I think it is very helpful in having the branches deal with each other in a respectful way, which I think is enormously important.

And I say that in preparation to the next comment, which I would ask you not to respond to, which is unfortunately this hearing follows on the heels of a decision yesterday that is wildly unpopular with not only me, but my constituents. And I say that because the issue of pay for judges is not pay for performance. It is pay for independence.

And it is important that those of us in America support the judiciary's independence when we agree with their decisions and when we disagree with their decisions. And I do. And that is why I very much agree that it is necessary to de-link the connection between pay for the judiciary and pay for Members of Congress.

I also—you know, recently the California State Bar Journal—that lawyers in California get every month did a survey of publicly employed lawyers. And the county council associates are earning more than the district court judges. And I don't begrudge the county councils or the city attorneys. But the fact is that the pay for district court judges has gotten wildly out of step.

And I think it is correct—the justices and Justice Breyer just said, you know, to be a member of the U.S. Supreme Court—there are probably people in the country eminently qualified who would do it for free for the opportunity to do it. But the dynamic is very different in the district court. People are already making financial sacrifices. And that seems hard to say when it is a lot of money to most Americans. But it is relative.

So I would just like to ask this question. And I was also thinking about the linkage. When I was in local government, I was on the board of supervisors. And I think the board of supervisors was paid something like $20,000 a year for a full-time job that was, you know, 10 or 12 hours a day. And we didn't want to just raise our own salaries.

And so, what we did was we said we will be paid 80 percent of whatever a municipal court judge is paid. And the State sets their salary, so we will never have a say in how we are paid. And that is the question I have, I guess, for the justices prospectively.

If we do something to address the gap that has been created in judicial pay, is there a way—do you have a recommendation on how we could structure—I mean, ultimately the Congress has to appropriate. I realize that. But to structure some other entity that

could advise with great credence the Congress on future pay increases so we don't create this problem again.

Do you have an idea on that, Justice Breyer?

Justice BREYER. I would look at Canada. And I would look at that legislation. And I would look at Britain because that is interesting. The example you raise is the third instance I have—those are the other two I know about. I didn't know about the Los Angeles.

Ms. LOFGREN. Santa Clara County.

Justice BREYER. Yes, I am sorry.

Mr. BERMAN. In Los Angeles, it is 100 percent of what the judges were paid—not 80 percent.

Ms. LOFGREN. We were the first. They copied us.

Justice BREYER. Well, the public has accepted that. And they have seen the need in those places. So I would look carefully at those two systems.

Ms. LOFGREN. I would just say one thing. And I know our time is almost up.

But, Justice Breyer, you mentioned an interesting point about intellectual property—well, they are all district court judges—but leaving to be arbiters for I.P. disputes. And it occurs to me that that could do great damage to the development of the law because those arbitration agreements don't have precedential value.

And it is important that the court be in a position to make decisions, you know, throughout not with great time spans in between because of the pace of technological change. Do you think that is unreasonable?

Justice BREYER. No, I agree with you. I mean, if people want to go to arbitration, that is fine.

Ms. LOFGREN. Of course.

Justice BREYER. I am for that. But if they all desert the court, then what will happen is exactly what you say, in my opinion.

Ms. LOFGREN. Justice Alito?

Justice ALITO. No, I think that is an excellent point.

Ms. LOFGREN. With that, Mr. Chairman, given that we are about to have votes, I will yield back.

Mr. BERMAN. I thank the gentlelady.

And the gentleman from Indiana, Mr. Pence?

Mr. PENCE. Thank you, Mr. Chairman.

And to Justice Breyer and Justice Alito, thank you for provocative and engaging testimony. And I have an open mind. I have spoken to members of the judiciary in Indiana. And I am very interested in the questions that are raised.

But I must also tell you I hope, Mr. Chairman, that some recording of this hearing will make its way into government classes around America. I have been a plaintiff before your bench. I like this side of the bench better.

But it seems to me that, as Chairman Conyers said, there is an extraordinary example here in your willingness to come to open yourselves up to this process that demonstrates the co-equal nature of the branches of our government. And I commend you for that personally, just as another public servant. Thank you for your witness of our form of government today.

And the point that I find most provocative and would invite you both to use whatever time I have remaining to address is this question of capstone. I candidly was not familiar with that term as a concern.

But, Justice Breyer, as you referred to that, I guess I am a small town boy from Southern Indiana. I can't think of a higher calling in life than to serve as a member of the Federal judiciary. And I find it deeply troubling to think that there is as a result of unintentional erosion of compensation that has occurred over the last generation that, in fact, our Federal judiciary has become a stepping stone in the course of career of men and women for whom it should in every sense be our objective that it would be a capstone.

I wondered if I just might ask you to expand. I will have your testimony, and I will review the transcript. But I think that is a point greatly worth amplifying in what is it—are we just talking specifically about monetary remuneration.

Are there other ways that we could ensure that we are saying to our brightest and our best, "Have a productive life in the private sector or in the public sector. But consider as a capstone of your career the opportunity to serve in an independent judiciary as a way of fulfilling a lifetime of service to the community." How do we accomplish that?

Justice BREYER. It is a very good question. I think, as I am sure you do, human beings are pretty complex. We are moved by so many different motives. We don't always know what those motives are. And compensation is in there as one of them.

And in my own life, I did have a chance after a number of years on the bench to take a different job. I didn't think I would be on the Supreme Court. No one thinks that, not a hope.

So it was a question of would I or would I not. And there are a lot of things to be said for it. And money was—no, it was—no, not really maybe. Who knows? You see? And I didn't take it.

And I remember driving back to the court, which at that time was in a rather scruffy building and there were big creaking doors opening going down this basement. And there were some law enforcement people there. I thought to myself when I drove in that day, good. I thought, good, I like this job. I am a Federal judge. And I love being a Federal judge. And it is fabulous.

And I would feel that way were I not on the Supreme Court and in my old job. So I understand what you are thinking. And I agree. And so, when I see instances—and there are—and we know that that plays a motivation. It is the absolute amount in part, and it is the down, down, down part. And that is what I fear the most. And that is why I said it about five times.

It is the stepping stone. No, not a stepping stone direct in your mind, not a stepping stone shadow, not a stepping stone when you secretly think to yourself in the middle of the night why am I doing this. No, no, no. It is the capstone. And it has been, and that was always true when I was growing up. And if there is one thing I want to keep, it is that.

Justice ALITO. I think there is a dangerous—I am sorry, Mr. Chairman. I think there is a disturbing trend. And that is what I tried to say in my opening statement. I think compensation is a major factor why people are leaving the bench. There are other,

there are other concerns. Security concerns are much more serious now than they used to be.

A lack of privacy is a greater concern than it used to be, a tremendous increase in the amount and the complexity of the work. Some of my former colleagues on the courts of appeals are now personally handling 500 cases a year.

That is an enormous, enormous—if you think about how many cases, how much time you have to handle each of those appeals, 500 cases a year—that is an enormous workload. And the cases are becoming more and more complex. So there are many things that are making a judicial career less attractive. I would say compensation is the number one factor.

Mr. PENCE. I thank both the justices.

Mr. Chairman, I hope as the Committee considers this at the Subcommittee and the full committee level that we also think broadly about what other disincentives there might be in addition to compensation that might be moving us toward a stepping stone status away from a capstone.

I yield back. Thank you.

Mr. BERMAN. Thank the gentleman.

And the gentleman from California, Mr. Issa?

Mr. ISSA. Thank you, Mr. Chairman. I realize we have got a vote on, so I will try to be brief so you don't have to drag folks back here.

Justice Alito, I received a call from one of your former fellow clerks who briefed me ad nauseum as to the San Diego court and sort of got me thinking in a different way than I might otherwise have. Without mentioning his name, he knows that I am thanking him for you.

I do think that a political entity being linked to an entity that once appointed is non-political. I mean, you are the ultimate in political entities until the day you are confirmed. And thereafter, I trust, that you aren't. But I do have a couple of questions.

First of all, U.S. attorneys make about $140,000 year. And it is the ultimate stepping stone. Right? Everyone understands that is for a short period of time and you will then move on to better, greener pastures, in most cases.

Administrative appointments—those are all stepping stones with rare exceptions. We have had a few that perhaps won't go on to better. But the vast majority of them find great financial gain post those positions.

You are kind of unique in that it is a capstone. And I think we all agree on the dais that it should be.

But I am going to ask—I am going to put you on the spot in a reverse way for a moment.

First of all, Justice Breyer, I will ask you one quick question. Those 21 judges—how many of them, do you think, had retirement pay coming to them from their time as Article 3 judges?

Justice BREYER. I don't know.

Mr. ISSA. But you would assume most of them or many of them.

Justice BREYER. Probably a significant number.

Mr. ISSA. Okay. So just as a hypothetical, one of our challenges is that if you decide not to make it a capstone, the retirement being

relatively quickly earned could be part of the problem, too, because you get to have your cake and eat it, too.

I am not sure we are going to change that, but I think that is something for those of us who are looking at possible changes in your compensation need to be aware that part of your compensation is a late to the bench quick compensation, which may encourage people that are going to work until 80 not to choose senior status but rather choose some other employment.

If we were to de-link, even for one day and then re-link, would the best commission be one that wasn't essentially done at the auspices of your A.O. or the Congress? In other words, do we have the level of independence in evaluating what it takes to attract, which I agree with Mr. Sensenbrenner. We attract very well and retain, which is what, I think, both of you were saying is the upcoming problem.

Should we have a truly third party? And should we do it in some way that formalizes it? In other words—and this is a hypothetical.

We de-link. We have an independent commission. We agree in advance that we will accept the package of the commission unless we vote otherwise. And then for, let us say, 10 years, the normal time between our political events of redistricting, we leave it linked with just cost of living and then every 10 years we commission a new study and go through that again. Is that something that hypothetically could take you out of this political conundrum that your graph shows so well?

Justice BREYER. Not so easy to do. We have the Volcker Commission, which did make a report, pretty totally independent, as far as I know.

Mr. ISSA. Right. But then it had to get into our politics.

Justice BREYER. Yes. But they tried it, remember, with the quadrennial commission. And that was supposed to do just what you say. And it was all coming along just fine when President Reagan was there. It was all approved and so forth. And then it got into the political environment. And then it just didn't happen.

Mr. ISSA. Right. And that is——

Justice BREYER. Very, very hard—I mean, maybe something—I am simply saying we have had some experience, and it is by no means a sure thing. And then I would go back and say I want to see what they have done in England and Canada and so forth. So it is not something there are obvious objections to. It is not something guaranteed to work.

Mr. ISSA. Okay. And then I will ask the harder question. I am one of the Members that was fortunate enough to do well in business before I came here. This is my capstone. And I didn't come here for a paycheck. But I do see many Members of the House who leave to be lobbyists because they have kids going to college.

Our constituents aren't aware that we don't get per diem. If you bring your judges here to Washington, they get per diem. They get essentially compensated for all their costs of being here. Members of Congress don't.

Is part of our problem—and this is putting you on the spot, as I said I would. Is part of our problem that we can't come to grips with our own compensation in a fair and impartial way and that

leads to us being unfair potentially to both of you, or at least to the judges beneath you?

Mr. BERMAN. If I were your lawyer, I would advise you not to answer that.

Mr. ISSA. Mr. Chairman, there is only question that we all have to have. And that is whether or not we are fair to ourselves. Can I ask unanimous consent that they be allowed to answer?

Justice BREYER. Do I think you are fair to yourselves?

Mr. ISSA. Yes, Justice.

Justice BREYER. What I really think?

Mr. ISSA. Yes, Justice.

Justice BREYER. No, I think you are not. I think you haven't been. I said that. I said I think that there are problems with Congress. There are problems with top levels in executive branch. There are problems all over the place.

And I said the reason that I haven't expressed myself on the other problems is I am a judge and I know my institution and I understand the political difficulties surrounding this. And, I am a judge who knows my own institution, not the others. And, two, I understand politics about one-tenth to one-one thousandth as much as you do. So there we have it.

Mr. BERMAN. We have had second bells. I am going to have to bring this hearing to a close. I do want to make one point in closing. There may be wonderful meritorious reasons for linkage. And a logic, a governmental, institutional logic to it. There may be deep ideological commitments to linkage. But do understand, not that this is a position you need to speak on. We are going to have to address the issue.

To the extent people say I will not give up on linkage, they are saying, notwithstanding your arguments, notwithstanding the risks, notwithstanding what you see happening, the consequences, all the different factors and its affect on potentially the quality of the bench, we are saying no to your request because from 24 years experience, if we insist on linkage, we will end up saying no to any change in the judicial salaries.

Mr. CONYERS. Mr. Chairman?

Mr. BERMAN. Yes.

Mr. CONYERS. These jurists have inspired, I think, from this discussion more Members of Congress will assess this problem in a much larger frame than we started out before this morning.

And I am very, very indebted to you both for your contribution toward this subject.

Mr. BERMAN. Well, with that and without objection, the hearing record will remain open until the close of business next Wednesday, April 25, for submission of any additional materials.

And we really do thank you both for coming down, and hope it wasn't too miserable an experience.

[Whereupon, at 12:09 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Exhibits for the
Testimony of

Samuel A. Alito, Jr.
Associate Justice, Supreme Court of the United States

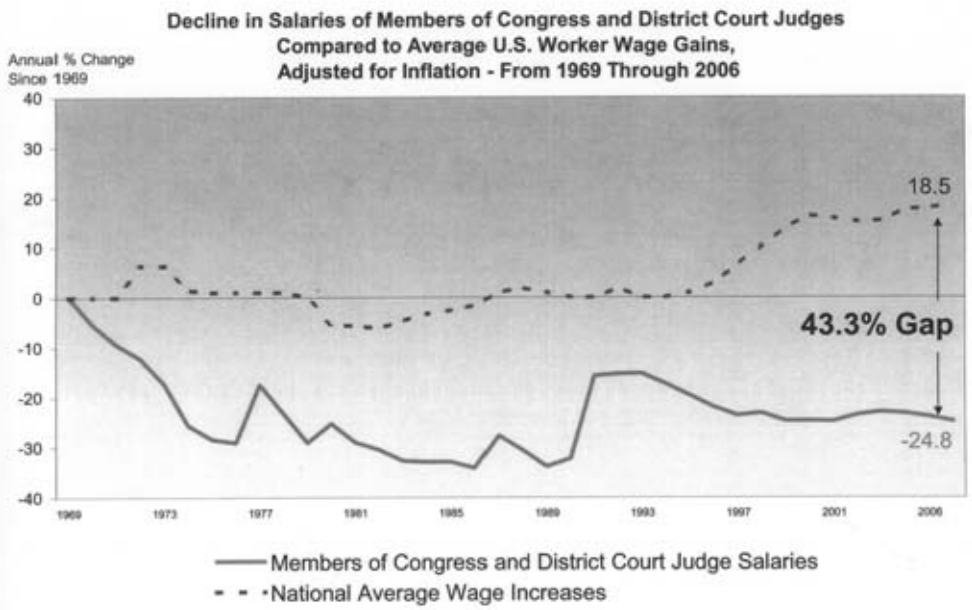
Before the
House Committee on the Judiciary
Subcommittee on the Courts, the Internet and Intellectual Property

"Oversight Hearing on Federal Judicial Compensation"

April 19, 2007

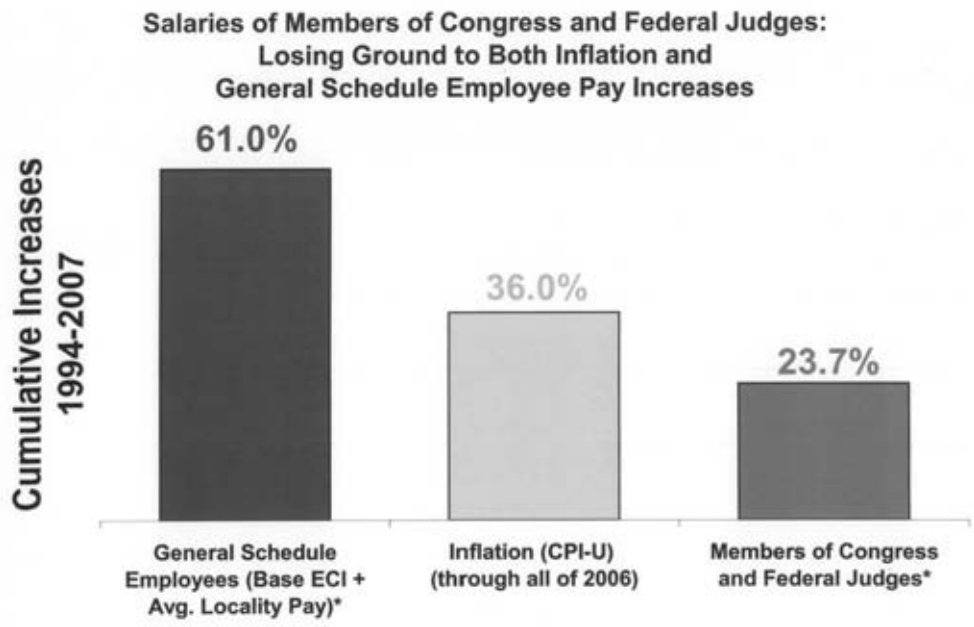
A total of 53 exhibits were submitted for the record. All of the exhibits submitted are not reprinted here but are included in the official hearing record on file with the Subcommittee on Courts, the Internet, and Intellectual Property. The exhibits not reprinted are Vacancy Announcements of employment opportunities at various Government Agencies, such as the announcement shown in Exhibit 3. Some of the announcements were accessible on the Internet, from such web sites as www.usajobs.gov, www.avuecentral.com, www.cftc.gov, www.quickhire.com, www.fdic.gov, www.federalreserve.gov, www.occ.treas.gov, www.ots.gov, and www.epa.gov.

EXHIBIT 1



Data from Bureau of Labor Statistics CPI-U Index/Inflation Calculator, and Social Security Administration National Average Wage Indexing Series (inc. forecasted 4.2% for 2006).

EXHIBIT 2



* - GS total includes average 2.2% increase as of Jan. 2007. Judges and Members have not received the 1.7% ECI adjustment for 2007 as established by formula.

EXHIBIT 3

Veterans Health Administration

Department: Department Of Veterans Affairs
Agency: Veterans Affairs, Veterans Health Administration
Sub Agency: Portland VA Medical Center
Job Announcement Number:
T38-07-110-JB

◄ Back to Search Results

Physician (Chief, Vascular Surgery)

SALARY RANGE: 125,000.00 - 275,000.00 USD per year
Recruitment/Relocation incentive may be authorized.

SERIES & GRADE: VM-0602-15

OPEN PERIOD: Sunday, January 07, 2007 to Friday, January 04, 2008

POSITION INFORMATION: Full-Time Permanent

DUTY LOCATIONS: 1 vacancy - Portland, OR

WHO MAY BE CONSIDERED:
Applications will be accepted from US Citizens, from current and former competitive service Federal employees, and people eligible under special hiring authorities.

JOB SUMMARY:

Applicants who applied under announcement T38-06-638-JB need not reapply as they will be considered under this announcement. This position is Open until Filled. The incumbent is a Vascular Surgery physician who is responsible for participating in and/or managing all aspects of a general surgery program, to include clinical, administrative, academic, and research components.

KEY REQUIREMENTS:
- U.S. Citizenship
- Agency Specific Requirements

◄ Back to Search Results

Send Mail to:
Department Of Veterans Affairs
3710 US Veterans Hospital Rd
PO Box 1034, P4HRMS
PORTLAND, OR 97207
US

For questions about this job:
Human Resources Assistant
Phone: 503-220-8262 x 57317

Email: robert.fenimore@va.gov

USAJOBS Control Number: 808822

EEO Policy Statement | **Reasonable Accommodation Policy Statement** | **Veterans Information**
Legal and Regulatory Guidance

Home | Search Jobs | My USAJOBS | Information Center | Veterans | Forms | Employer Services
FAQS | Privacy Policy | Help | Site Map
Contact Us | Privacy Act and Public Burden Information

This is a United States Office of Personnel Management website. USAJOBS is the Federal Government's official one-stop source for Federal jobs and employment information.

EXHIBIT 18

Department of Defense

National Security Personnel System
Worldwide Pay Table

Schedule #2

Issue Date: 07 JAN 2007

PAY SCHEDULES	BASE SALARY (PER ANNUM)		
	[illegible]		[illegible]
Pay Band 2	$86,445	-	$175,000
Pay Band 3	$111,870	-	$225,000
Pay Band 1	$25,623	-	$61,068
Pay Band 2	$38,824	-	$102,848
Pay Band 3	$75,879	-	$127,031
Pay Band 1	$16,630	-	$37,130
Pay Band 2	$31,740	-	$55,580
Pay Band 3	$46,974	-	$73,194
Pay Band 1	$31,740	-	$61,068
Pay Band 2	$56,301	-	$107,991
Pay Band 3	$79,115	-	$127,031
Pay Band 4	$101,700	-	$200,000

Authority: This schedule of minimum and maximum rates has been established under the authority of paragraphs 9901.321 and 9901.322 of title 5, Code of Federal Regulations.

Standard Local Market Supplements

Target (Occupation) Local Market Supplement

Effective Date: 7 January 2007
Supersedes Schedule Issued: 28 April 2006

Published By: Civilian Personnel Management Service, Wage and Salary Division (http://www.cpms.osd.mil/WAGE/WAGE_index.aspx).

EXHIBIT 38

Careers at the Federal Reserve Board

Guiding the Nation's Economy

Quick Links
- Benefits
- Salary
- Commitment to Diversity
- Frequently Asked Questions (FAQs)
- Getting to the Board
- Privacy Act Notice (22 KB PDF)
- Federal Reserve Board
- - Purposes & Functions

Career Opportunities

Salary

2007 FR Salary Structures
(Effective December 24, 2006)

Exempt

Grade	Minimum	Midpoint	Maximum
FR-21	$35,320	$44,150	$52,980
FR-22	$41,330	$51,660	$62,000
FR-23	$47,520	$59,400	$71,280
FR-24	$56,080	$70,100	$84,120
FR-25	$65,960	$82,450	$98,940
FR-26	$75,980	$94,970	$113,970
FR-27	$88,730	$110,910	$133,100
FR-28	$103,100	$128,870	$154,650
FR-29	$118,980	$148,720	$178,470

Non-Exempt

Grade	Minimum	Midpoint	Maximum
FR-31	$22,870	$28,590	$34,310
FR-32	$25,980	$32,470	$38,970
FR-33	$28,850	$36,060	$43,280
FR-34	$32,170	$40,210	$48,260
FR-35	$35,780	$44,720	$53,670
FR-36	$40,500	$50,630	$60,750

2007 Wage Employee Salary Structure
(Effective December 24, 2006)

Grade	Minimum	Midpoint	Maximum
41	$23,640	$30,730	$37,820
42	$28,350	$36,850	$45,360
43	$34,020	$44,230	$54,430
44	$40,830	$53,080	$65,330
45	$49,000	$63,700	$78,400
46	$58,800	$76,440	$94,080
47	$70,550	$91,720	$112,880

EXHIBIT 39

13. Number and Annual Salaries of Officers and Employees of the Federal Reserve Banks, December 31, 2005

Federal Reserve Bank (including Branches)	President[1]	Other officers		Employees			Total	
				Number				
	Salary (dollars)[2]	Number	Salaries (dollars)[2]	Full-time	Part-time	Salaries (dollars)[2]	Number	Salaries (dollars)[2]
Boston[3]	355,600	62	10,055,965	927	98	59,160,815	1,088	69,612,380
New York	327,800	271	50,656,321	2,594	54	196,934,336	2,920	247,918,457
Philadelphia	295,700	53	7,735,500	912	36	48,862,872	1,002	56,892,072
Cleveland	249,000	60	8,780,700	1,481	36	70,106,859	1,578	79,136,559
Richmond	262,800	69	9,771,300	1,629	67	91,936,392	1,766	101,970,592
Atlanta	355,600	77	12,185,600	1,917	41	101,452,089	2,036	113,993,289
Chicago[3]	355,600	84	12,367,969	1,325	57	81,933,636	1,467	94,657,185
St. Louis	295,700	73	10,227,500	972	54	51,984,088	1,100	62,507,288
Minneapolis	355,600	43	6,221,000	1,164	121	60,410,547	1,329	66,987,147
Kansas City	323,800	73	10,761,200	1,237	47	66,213,955	1,358	77,298,955
Dallas	262,800	54	7,838,405	1,199	25	60,943,991	1,279	69,045,196
San Francisco	310,700	73	12,606,008	1,626	30	106,306,340	1,730	119,223,048
Federal Reserve Information Technology	. . .	36	5,432,900	700	3	56,009,962	739	61,442,862
Office of Employee Benefits	. . .	7	1,412,100	34	0	2,721,309	41	4,133,409
Total	**3,748,700**	**1,035**	**166,092,448**	**17,717**	**669**	**1,054,977,290**	**19,433**	**1,224,818,438**

1. The policies governing the salaries of Federal Reserve Bank presidents were revised in 2005. Under the revised policies, appointment salaries are normally 85 percent of the midpoint of the salary range (an 85 compa-ratio), with the exception of the appointment salary of the New York Reserve Bank president, which is normally set at a 95 compa-ratio. The Board has discretion to approve a higher appointment salary if requested by a Reserve Bank's board of directors.

On January 1 of each year, each president receives a salary increase equal to the percentage increase in the midpoint of his or her salary range. In addition, on every third-year anniversary of his or her initial appointment (through year 9), each president receives a salary increase that results in a higher compa-ratio, as follows: year 3, 95 (for the New York Bank, 105), year 6, 105 (New York, 115); year 9, 115 (New York, 125).

There continue to be tiered salary ranges for Reserve Bank presidents, reflecting differences in the costs of labor in the head-office cities. Currently, the New York and San Francisco Banks are in tier 1, which has a midpoint of $345,000; the Boston, Philadelphia, Richmond, Atlanta, Chicago, Minneapolis, and Dallas Banks are in tier 2, which has a midpoint of $309,200; and the Cleveland, St. Louis, and Kansas City Banks are in tier 3, which has a midpoint of $281,600. The Board reviews Reserve Bank officer salary ranges and the placement of individual Reserve Banks in the salary tiers annually.

2. Annualized salary liability based on salaries in effect on December 31, 2005.

3. Data for 2004 have been corrected, as follows: For the Boston Reserve Bank, employee annual salaries, $57,177,807; total annual salaries, $66,461,907. For the Chicago Reserve Bank, number of full-time employees, 1,471; number of part-time employees, 60; total number of employees, 1,624; employee annual salaries, $86,707,060; total annual salaries, $100,031,698.

. . . Not applicable.

EXHIBIT 40

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Careers at the OCC:
Salaries

The OCC offers a performance-based merit pay program designed to reward employees for excellent performance while allowing the OCC to align its human resources with its strategic direction and goals. The OCC pay plan/salary structure includes nine pay bands that provide equal pay ranges for jobs with comparable responsibilities.

Employees in certain cities also receive geographic pay differentials that are paid in addition to base salary to recognize cost of labor differences.

Pay increases are based on individual performance without regard to national origin, race, sex, religion, age, color, disability, or other non-merit factors.

2006 Salary Structure

Pay Band	Minimum	Maximum*
I	$19,600	$30,400
II	$24,000	$40,900
III	$33,000	$56,400
IV	$41,100	$76,500
V	$56,000	$104,200
VI	$74,100	$137,900
VII	$95,400	$177,600
VIII	$121,900	$223,000
IX	$158,300	$245,300

*Salaries may be restricted to any applicable pay caps.

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EXHIBIT 50

PERSONNEL AND READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 17 2004

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DEFENSE FIELD ACTIVITIES

Subject: Employment of Highly Qualified Experts

Section 9903 of title 5, United States Code (U.S.C.), as enacted by section 1101 of the National Defense Authorization Act, for Fiscal Year 2004, Pub. L.108-136, 117 Stat. 1632-1633 (November 24, 2003), provides the Department of Defense with the ability to attract eminent experts with state-of-the-art knowledge in fields of critical importance to the Department. Specifically, this new legislation authorizes DoD to develop a program to hire highly qualified experts in critical occupations for up to five years, with the possibility of a one-year extension, and to prescribe the appropriate compensation.

The Secretaries of the Military Departments, and heads of Defense Agencies and Field Activities with independent appointing authority for themselves and their serviced organizations are hereby redelegated the authority delegated to me by Deputy Secretary of Defense memorandum, dated February 11, 2004, to hire and compensate highly qualified experts consistent with the attached policy. The Secretaries of the Military Departments may further delegate this authority to Directors of those Defense Laboratories not excluded by statute from the National Security Personnel System.

The attached guidance implements DoD policy and procedures for appointing and compensating highly qualified experts as authorized under 5 U.S.C. 9903. The Deputy Under Secretary of Defense (Civilian Personnel Policy) will provide allocations for this fiscal year under separate cover.

David S. C. Chu

Attachment:
As stated

Department of Defense

Employment of Highly Qualified Experts
Guidance and Procedures

A. General Information

1. Section 1101 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1632-1633 (November 24, 2003), amends title 5, United States Code (U.S.C.), by adding a new Chapter 99 entitled Department of Defense (DoD) National Security Personnel System (NSPS).

2. Section 9903 of title 5, U.S.C., gives the Secretary of Defense authority to establish a DoD program to attract highly qualified experts. This guidance implements that authority. Tbis authority does not apply to the DoD laboratories excluded from NSPS under 5 U.S.C. 9902(c).

3. Designees. The Secretaries of the Military Departments and the Heads of Defense Agencies and DoD Field Activities with independent appointing authority on behalf of themselves and their serviced populations may appoint highly qualified experts from outside the civil service and uniformed services to positions with any work schedule (i.e., full-time, part-time, or intermittent) without regard to any other provisions of title 5, U.S.C. These authorities may not be further re-delegated, except that the Secretaries of the Military Departments may redelegate this authority to Directors of those Defense Laboratories not excluded by statute from NSPS.

4. This authority is in addition to the authority to appoint experts and consultants under 5 U.S.C. 3109 and section 1101 of the NDAA for FY 1999, as amended. Currently employed experts may continue to serve in their positions in accordance with the provisions of their appointment.

5. Employment under this authority may not exceed five years. Designees may, on a case-by-case basis, extend appointments for up to one additional year.

6. Section 9903(b)(2) of title 5, U.S.C., authorizes the Secretary of Defense to prescribe the rates of basic pay for positions to which employees are appointed at rates not in excess of the maximum rate of

basic pay authorized for senior-level positions under 5 U.S.C. 5376, as increased by locality-based comparability payments under 5 U.S.C. 5304. Additionally, the Secretary may pay such employees amounts in addition to basic pay within certain limitations (See Pay Administration Provisions, page 4).

7. Hiring of qualified experts shall be in accordance with the procedures prescribed in this guidance. Designees may also set the pay upon initial appointment of highly qualified experts, increase pay, and pay bonuses and incentives as prescribed in this policy.

8. The total number of highly qualified experts DoD-wide may not exceed 2,500 at any time. The Deputy Under Secretary of Defense (Civilian **Personnel Policy (DUSD)(CPP)) will manage allocation reserves and approve cross leveling** of allocations. At the beginning of each fiscal year, the DUSD(CPP) will apportion a share of the allocations based on civilian end strength, prior-year usage and the needs of the Military Departments and the Fourth Estate.

9. As the need arises, underutilized authorizations may be re-allocated and additional allocations may be requested with justification. As previously indicated, these actions will be authorized by the DUSD(CPP).

10. In the event the Secretary of Defense terminates this program, the following provisions will apply to an employee who, on the day before the program terminates, is serving in a position pursuant to an appointment under 5 U.S.C. 9903(b):

    (a) The termination of the program will not terminate the employee's employment in that position before the expiration of the lesser of:

        (1) The period for which the employee was appointed; or

        (2) The period to which the employee's service is limited under 5 U.S.C. 9903(c) and this policy, including any extension made before the termination of the program; and

    (b) The rate of basic pay prescribed for the position may not be reduced as long as the employee continues to serve in the position without a break in service.

B. Appointment Procedures

1. A highly qualified expert is an individual possessing uncommon, special knowledges or skills in a particular occupational field beyond the usual range of expertise, who is regarded by others as an authority or practitioner of unusual competence and skill. The expert knowledge or skills are generally not available within the Department and are needed to satisfy an emerging and relatively short-term, non-permanent requirement.

2. The appointment of highly qualified experts is limited to critical occupations, as determined by the Designee, necessary to promote the Department's national security mission.

3. The authority to employ experts shall not be used to provide any one person temporary employment in anticipation of a permanent appointment; to provide desired services that are readily available within the Department or another Federal agency; to perform continuing Department functions, including work of a policy, decision-making, or managerial nature; to bypass or undermine personnel ceilings or pay limitations; to aid in influencing or enacting legislation; to give former Federal employees preferential treatment; to do work performed by regular employees or to fill in during staff shortages.

4. An employee who separated under authority of the Voluntary Separation Incentive Pay (VSIP) Program is prohibited from reemployment with the Department for 12 months after separation, and may not be reemployed within five years unless the employee repays the separation incentive. Appointment under this authority constitutes reemployment with the Department and all prohibitions and repayment requirements apply. Reemployment restrictions are specified in Section 9902(i) of title 5, U.S.C., and implementing DoD VSIP guidance and procedures.

5. Individuals employed under this policy will be given Excepted Not To Exceed appointments (up to five years) using Nature of Action Code 171, Authority Code ZLM, and legal authority 5 U.S.C. 9903. The pay plan will be EE (Experts Other).

6. Components may submit requests for extension of appointment for up to one additional year to the DUSD(CPP) for approval on a case-by-case basis. Requests must include a justification of the need to retain the

requirements, and goals; or because of a change in the employee's duties or responsibilities.

3. Additional Payments. Designees may authorize an additional payment only as a recruitment or relocation incentive, or to recognize specific accomplishments, contributions, or performance subject to the following limitations established under **5 U.S.C. 9903(d):**

   (a) The total of all additional payments made under these provisions during any 12-month period may not exceed the lesser of: (1) **$50,000 in FY 2004 (which may be adjusted annually after FY 2004); or (2) the amount equal to 50 percent of the employee's annual rate of basic pay.**

   (b) The employee's total compensation in any calendar year, including basic pay and any additional payments, may not exceed the total annual compensation payable at the salary set under 3 U.S.C. 104.

   In addition, if a payment is authorized as a recruitment or relocation incentive, the recipient must sign a written service agreement documenting a minimum period of employment commensurate with the incentive prior to receiving the payment.

D. Documentation

1. Components will use the Defense Civilian Personnel Data System (DCPDS) to record the employment of highly qualified experts. Components must maintain written documentation of the criteria used for each appointment, as well as the factors and criteria **used in setting initial pay, pay increases, and additional payments. Components will retain documentation for three years after employment is terminated.**

2. The DUSD (CPP) will monitor the effective use of this appointment authority and may establish reporting requirements, as necessary. DCPDS will be used to obtain information on the employment of highly qualified experts to assist in meeting any reporting requirements.

E. **Accountability**
Designees are responsible for the appropriate and effective use and oversight of this authority to support mission requirements.

EXHIBIT 51

FAS Staffing Advisory Section

EMPLOYMENT OF HIGHLY QUALIFIED EXPERTS

Frequently Asked Questions

ST- 004
June 6, 2005
For Additional Information: 703-696-6301, Team 4; Staffing Advisory 3, DSN 426-6301

Q1. What is a highly qualified expert?

A1. A highly qualified expert is an individual possessing expert knowledges or skills not available within the Department of Defense (DoD) that are needed to satisfy an emerging and relatively short-term, non-permanent requirement.

Q2. What statute granted DoD the authority to employ highly qualified experts?

A2. Section 9903 of title 5, United States Code (U.S.C.), authorizes the Secretary of Defense to establish a program within DoD to employ highly qualified experts.

Q3. What are examples of occupations that may be filled by highly qualified experts?

A3. Some examples of occupations are those requiring advanced foreign languages, science, engineering, mathematics, and medical skills, as well as those related to health, safety, and national security. However, there is no limitation on the types of occupations to which a highly qualified expert may be appointed.

Q4. Does the authority to hire highly qualified experts under 5 U.S.C. 9903 replace the already existing authority provided by 5 U.S.C. 3109?

A4. No, the two authorities are different, and will apply in different situations. The Department may continue to hire experts and consultants in accordance with the provisions of 5 U.S.C. 3109 in appropriate cases.

Q5. What type of appointment is given to individuals employed as highly qualified experts?

A5. Individuals employed under this policy will be given time limited, Excepted Service appointments (not to exceed five years) using Nature of Action Code 171, Authority Code ZLM, and Authority 5 U.S.C. 9903.

Q6. How will appointments made under these provisions be documented?

A6. Components must maintain written documentation of the criteria used for each appointment, as well as the factors and criteria used in setting initial pay, pay increases, and additional payments, for three years after the employment is terminated.

Q7. What is the appropriate pay plan for individuals employed as highly qualified experts?

A7. The pay plan is EE (Experts-Other).

Q8. May an individual who is currently a civil service employee or a member of the uniformed services be appointed as a qualified expert?

A8. No. Title 5 U.S.C. 9903(b)(1) grants the Secretary of Defense the authority to appoint highly qualified experts from outside the civil service and uniformed services (as such terms are defined in 5 U.S.C. 2101).

Q9. At what level should basic pay be set for an individual initially appointed as an expert under this authority?

A9. Pay may be set at any rate between the basic rate for GS-15, step 10, up to the rate for Executive Level IV.

Q10. Do experts also receive locality pay?

A10. Experts working in the Continental United States are entitled to receive locality pay as long as the total of basic pay plus locality pay does not exceed the rate for Level III of the Executive Schedule.

Q11. What factors should be considered in determining basic pay for a newly appointed expert?

A11. Labor market conditions, personal qualifications, type of position and its criticality to the organization's mission, experience, current salary, and mission impact of work assignments are some of the factors that may be considered in setting the expert's rate of basic pay.

Q12. On what basis may a highly qualified expert's rate of basic pay be adjusted?

A12. An expert's rate of basic pay may be increased as a result of an individual's exceptional accomplishments that contribute to an organization's strategic mission or because of a change in duties or responsibilities.

Q13. May highly qualified experts receive more than one pay adjustment in a 12-month period?

A13. Yes, if each adjustment is based upon the employee's exceptional level of accomplishment related to projects, programs, or tasks that contribute to the Department's or Component's strategic mission requirements and goals, or because of a change in the employee's duties or responsibilities (subject to the Executive Level IV pay cap).

Q14. Is a highly qualified expert entitled to receive an annual pay adjustment each year?

A14. An employee has no entitlement to any adjustment in basic pay. However, locality pay will be adjusted in line with any change in the locality pay percentage that applies to the expert's duty station.

Q15. May an expert's rate of basic pay ever be reduced?

A15. No. The rate of basic pay for an expert hired under this authority may not be reduced as long as the employee continues to serve in the prescribed position without a break in service.

Q16. Are experts hired under this appointment authority eligible to receive premium pay such as overtime, night, holiday, and Sunday premium pay?

A16. No. Highly qualified experts are not entitled to any types of premium pay.

Q17. Are highly qualified experts eligible for any additional pay beyond their basic and locality pay?

A17. Yes. They may receive additional payments under 5 U.S.C. 9903(d). They are not eligible for any bonus, monetary award, or other monetary incentive except for the payments authorized by section 9903.

Q18. What are the pay limitations established under 5 U.S.C. 9903(d)?

A18. An expert may receive additional pay only to the extent that the total of all additional payments during any 12-month period does not exceed the lesser of (1) $50,000 (in FY 2005 – this figure may be adjusted in future years by the USD(P&R) or the PDUSD(P&R)); or (2) the amount equal to 50 percent of the employee's annual rate

of basic pay. Additionally, the employee's total compensation in any calendar year, including basic pay, locality pay, and additional payments, may not exceed the salary for the Vice President.

Q19. If an expert is authorized an additional payment under section 9903, must the recipient sign a service agreement?

A19. There is no requirement for a service agreement in those cases where the additional payments authorized by section 9903 are made at the end of the performance period. However, if the payment(s) made is in the nature of a recruitment or retention bonus, paid at the start of the performance period, the organization may require a service agreement.

Q20. How will appointments made under these provisions be documented?

A20. Components must maintain written documentation of the criteria used for each appointment, as well as the factors and criteria used in setting initial pay, pay increases, and additional payments, for three years after the employment is terminated.

EXHIBIT 54

OPINION

Judgment Pay

By Paul A. Volcker

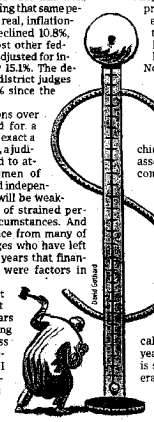
Anyone appearing before a judge in a federal courtroom—plaintiff, defendant, juror—will feel apprehensive. There are big issues at stake. Personal reputation and family fortunes, even imprisonment, may be at risk. Business practices can be questioned. The actions of government itself, even the constitutionality of its laws, can be challenged.

What we have a right to ask—what we must demand—is that the cases be decided fairly, by capable judges acting in a context of high professional standards and personal independence. It is those qualities that the framers of our Constitution sought to protect by providing lifetime appointment for federal judges and forbidding reduction in their compensation. Yet those qualities can also be eroded, not consciously, not by design, but by an insidious neglect. The simple fact is that judicial compensation has not kept pace with reasonable requirements.

The historical pattern is unambiguous. The last comprehensive review of government salaries, including the judiciary, took place in 1989. Twenty years after the previous full-scale realignment of federal salaries in 1969, the concept and goal set out were clear: the substantial past shortfall—relative to the cost of living and private-sector pay over the previous 20 years—would be at least partly corrected. Thereafter, pay was to be annually adjusted based on increases in private-sector wages in order to keep pace with those changes and inflation.

The approach has failed. Congress has simply refused to make good on its expressed goal, and has not even provided cost of living adjustments. It has now been 16 years since this last judicial pay raise took full effect. Since that time, average American workers' wages, when adjusted for inflation, have risen 18.5%. During that same period, federal judges' real, inflation-adjusted pay has declined 10.8%, while the pay of most other federal workers, when adjusted for inflation, has risen by 15.1%. The decline in real pay of district judges has dropped by 25% since the earlier 1969 review.

Political inhibitions over time, gradually and for a while imperceptibly, exact a real cost. Specifically, a judicial system designed to attract men and women of broad experience and independence of judgment will be weakened by the reality of strained personal economic circumstances. And now there is evidence from many of the 100 federal judges who have left the bench in recent years that financial considerations were factors in their decisions.


David Gothard

The force of that concern was brought home to me a few years ago. Instead of feeling any apprehensiveness about appearing before a federal judge, I found myself in a reversal of roles. I was chairman of the National Commission on the Public Service—a group of men and women with long service in both Democratic and Republican administrations deeply disturbed by the strong evidence of eroding trust in government. In that capacity, I received a request from then Chief Justice William Rehnquist and Associate Justice Stephen Breyer to appear before the commission. They urgently wanted to express their concern about the erosion in judicial compensation and the impact it was having on recruiting and keeping federal judges. Now, that concern has been forcibly reiterated and amplified by present Chief Justice John Roberts in his annual report on the judiciary.

No one, not the two chief justices, not their judicial associates, not I, not my fellow commissioners, certainly not the American public or its elected representatives, argue that judicial salaries need to approach those of successful legal practitioners in the private sector (it has recently been reported that remuneration of partners in the nation's large law firms now typically exceeds $1 million a year). At the other extreme, it is surely anomalous that federal district court judges make less than the salary plus bonuses of newly minted lawyers in those same prestigious firms in New York, Washington and other big city firms.

The judiciary should—and historically has—drawn upon distinguished academics or lawyers serving in different branches of government. Others, over a long career in private practice, have attained financial independence while family responsibilities have diminished. But even among those groups, compensation has become a relevant consideration. More acutely, there are the active practitioners in private law "at the top of their game"—men and women potentially attracted to public service but with families to raise—unable or unwilling to accept so small a fraction of their current and potential earnings. And, in fact, the number of appointees from those ranks has been declining.

> We are courting trouble by remunerating our judges so poorly.

So what is the reasonable level of judicial compensation? Consider the district courts where the greatest number of judgeships are. While judges cannot expect to equal the salaries of partners in large law firms, the National Commission determined that their compensation should be comparable to that of law school deans, senior professors and other nonprofit leaders. Today, at $165,200, district judge salaries fall more than 50% below what many law school deans or their top professors make. Moreover, unlike those academics and the leaders of nonprofit institutions, there is very limited possibility of earning other income.

And consider this: if the salary of district court judges had increased from their actual salary in 1969 by the same percentage as the total percentage change in American worker wages from 1969 to 2006, district judge compensation would be $261,300. That number is consistent with the recommendation of the National Commission on the Public Service.

Three years ago, the National Commission on the Public Service pointed to judicial pay as "the most egregious example of the failure of federal compensation policies." That failure was not been repaired; Congress did pass legislation in 1999, effective Jan. 20, 2001, to double the president's salary to $400,000 from $200,000. Now, at long last, my sense is that Congress and the president may finally be prepared to take a new look at judicial salaries, to deal with the political resistance and to recognize what is ultimately at stake.

The truth is there should be no shortage of men and women interested in federal judgeships. Those positions satisfy an urge for public service. They convey (or should convey) a sense of honor and prestige in the community. They can (or should) provide along with intellectual stimulus a sense of independence conveyed by lifetime appointment and financial stability.

The authors of the Constitution took care to protect those qualities by providing a reasonable assurance of financial security for our federal judges. Plainly, the time has come to take heed of the deep concerns of two chief justices and to honor the constitutional intent.

Mr. Volcker was chairman of the Federal Reserve from 1979-1987 and twice chaired a National Commission on the Public Service.

April 18, 2007

Honorable Howard Berman, Chairman
Subcommittee on Courts, the Internet and Intellectual Property
House Committee on the Judiciary
B-352 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Berman:

The strength of our justice system is dependent on a stable and objective judiciary. The current salary levels of Federal judges are alarmingly low and threaten to adversely impact the administration of justice in our Federal courts. The American Association for Justice ardently supports increasing the salary of Federal judges to preserve the integrity of our Federal judiciary.

The U.S. Constitution contains two vital provisions addressing Federal judges: (1) life tenure, and (2) a prohibition against the diminution of compensation. Life-long tenure not only provides for a stable judicial system, but also a higher likelihood that decisions are based on independent judgment free from the fear of retaliation or political consequences. The primary purpose of the prohibition against diminution was not, as many assume, to simply financially benefit judges, but rather to attract and retain the most upstanding and competent individuals to the bench to serve free from outside influences. Further inaction regarding judicial salaries will severely undermine the purposes behind these two fundamental Constitutional provisions.

Today, the salary rates of Federal judges are at an all-time low. From 1969 through 2006, the average U.S. worker earned an 18.5 percent increase in compensation adjusted for inflation. During that same period of time, the salaries of U.S. District Court judges *decreased* by 24.8 percent due to inflation. Over the past 40 years the salaries of Federal judges have eroded 43.3 percent compared to the average U.S. worker.

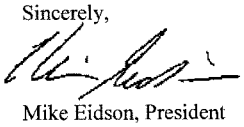
The inadequate compensation currently earned by the Federal judges makes it exceedingly difficult for the Federal judiciary to retain judges. Since 1990, 75 Article III judges have left the bench through resignation or retirement. In 2005

alone, nine Article III judges resigned or retired from the bench, representing the largest departure from the bench in any one year. These numbers continue to grow and are particularly alarming, considering that between 1958 and 1969, only three Article III judges resigned from office. Many of the judges who have retired or resigned in recent years cited financial considerations as a big factor in their decision to leave the bench.

The continued salary erosion causes not only a significant number of judges to leave the bench in favor of a more financially lucrative position in the private sector, but also results in a decreased pool of qualified candidates. Failing to increase judicial salaries could result in a judiciary that is not representative of the legal talent of our nation. When the pool of judicial candidates is limited to those individuals who can either afford to serve at vastly below-market rates or accept the position because their abilities and qualifications do not command greater compensation, justice is not served. The strength of our Federal judiciary and our government is contingent on recruiting and retaining the brightest and most qualified legal minds to preside over our courts.

The time to act is now. We urge Congress to remedy this pay inequity through swift action. The integrity of our justice system is dependent on it.

Sincerely,



Mike Eidson, President
American Association for Justice

cc:

Honorable John Conyers, Chairman
House Committee on Judiciary
Honorable Howard Coble, Ranking Member
House Subcommittee on Courts, the Internet and Intellectual Property
Honorable Lamar Smith, Ranking Member
House Committee on Judiciary

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Special Edition April 2007

How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries

Russell R. Wheeler and Michael S. Greve

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EXECUTIVE SUMMARY

The 2003 National Commission on the Public Service, chaired by Paul Volcker, called judicial salaries the "most egregious example" of failed federal compensation policies, referenced a "similar crisis" as to executives, and stated flatly that "[f]ew democracies in the world expect so much from their national legislators for so little compensation."[1]

For 20 years, legislators have matched their salaries to those of United States district judges and deputy cabinet secretaries. They hoped that coupling their own compensation with that of officials less in the public eye would salvage legislative salary increases despite voter hostility. However, Congress has still been reluctant to increase its salaries (compared to, say, average worker wage gains). Thus, linkage has not produced the benefits legislators anticipated for their own salaries, and at the same time, it has held back less controversial salary increases for judges and executives.

This paper examines salary linkage, in particular judicial-legislative linkage. We describe the federal judicial system and its judges' salaries, review the intermittent history of salary linkage, and consider arguments in support of linkage. For purposes of this paper, we are agnostic as to judicial or legislative compensation per se. Determining appropriate salary levels requires reasoned assessments of relevant job markets; salary effects on recruitment, retention, job satisfaction and many other factors; as well as comparisons of the full range of government benefits—issues that are well beyond the scope of this paper.

After reviewing materials involving linkage, however, we are confident that

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it has no bearing on the question of what salaries should be and, in fact, distorts the relevant considerations. In particular:

- Linkage is a one-size-fits-all salary determination for officials with different responsibilities and career anticipations.
- Data are at best inconclusive on whether linkage serves the practical justification offered for it—that it provides members greater salary increases than they could otherwise achieve.
- Linkage has not kept subordinate salaries in check. Salaries for numerous executive branch staff are higher than the salaries for members, district judges and deputy secretaries.
- Linked salaries do not symbolize equality between the branches.
- No jurisdiction similar to the United States requires salary linkage.
- There is no evidence that informed public opinion supports linkage.

Federal Judges and Their Salaries

The federal judiciary comprises the Supreme Court, 13 courts of appeals, 91 district and bankruptcy courts, the International Trade Court, the Federal Claims Court, and three territorial courts. Of the 1,790 authorized judgeships, 871 are for judges who serve, as the Constitution says, "during good Behaviour" (essentially for life) and whose salaries may "not be diminished during their Continuance in Office." Bankruptcy judges, magistrate judges and Federal Claims Court judges serve for terms. Today, federal judges' salaries range from $212,100 (the chief justice) to $70,166 or less (part-time magistrate judges). The most common salary is $165,200 for judges of the district courts, the International Trade Court, and the Federal Claims Court.[2] Bankruptcy and full-time magistrate judges' salaries are, by statute and policy of the United States Judicial Conference, 92 percent of district judge salaries.[3] Appendix Table 1 shows the appointment method, term, salary, number of positions, number of incumbents, and number of senior and recalled judges.

Congress sets life-tenured judges' salaries in two ways: First, it has authorized annual increases for judges,[4] high-level executive branch officials, [5] and members of Congress[6] based on economic indices and contingent on the president's proposed adjustments in federal civilian workforce salaries. These adjustments take effect unless Congress rejects or modifies them,[7] except that judicial salary increases need specific statutory authorization. [8] Congress imposed that requirement in 1980 after the Supreme Court held partially unconstitutional statutes that rescinded automatic executive-judicial-legislative increases in 1976 and 1979. Those rescissions unconstitutionally reduced judicial salaries because they took effect after the increases had vested (in 1976 a few hours later).[9]

Second, because conditions other than annual changes in labor costs bear on top officials' salaries, Congress created a bi-partisan commission to present salary recommendations to the president every four years (hence the term "quadrennial commission"); the president in turn sends Congress his own recommendations, to take effect unless Congress intervenes.

Legislative-judicial salary linkage has had an intermittent history in the 116 years since the federal judicial system took its present form.

The idea behind presidential salary recommendations that raise top officials' salaries unless Congress acts is to avoid having Congress vote for its own pay raises. Things have not always worked out that way. Since 1989, when the latest of the automatic adjustment mechanisms was enacted, Congress rejected proposed increases in 1995, 1996, 1997, 1999 and 2007. In 1994, federal employees (and thus the top officials) received no across-the-board pay adjustment because the president, citing large budget deficits, invoked a statutory exception.[10]

As to the quadrennial recommendations: In 1967, Congress created the Commission on Executive, Legislative, and Judicial Salaries,[11] which reported regularly until 1988. Presidents' recommendations were usually lower than the commission's, but Congress rarely accepted even the president's recommendations.[12] Congress reorganized the commission in 1989 as the Citizens' Commission on Public Service and Compensation,[13] but it has never functioned.[14]

History of Legislative-Judicial Salary Linkage

Linkage in the federal legislative-executive-judicial context today means the same salary for district judges, members of Congress, and deputy cabinet secretaries and agency heads (hereafter EL-IIs, denoting Level II of the Executive Schedule[15]). There is no cross-branch linkage for circuit judges, although Congress in recent years has set their salaries at about 106 percent of district judge salaries. For fiscal year 2007, Congress denied itself the automatic adjustment[16] and has not yet permitted federal judges to receive it.[17] Members and judges thus receive $165,200, but EL-IIs receive $168,000.[18]

The only explicit statutory mandate to link high-level salaries appears in the 1989 Ethics Reform Act, which restricted officials' teaching income and prohibited the receipt of honoraria. It also provided for the annual salary adjustment mechanism now in use, and it told the quadrennial commission that its pay recommendations "for a Senator, a Member of the House of Representatives,...a judge of a district court..., a judge of the...Court of International Trade, and each [EL-II] office or position...shall be equal"[19]—as they were in 1989. The Act also mandated equal salary recommendations for the Chief Justice, Vice President, Speaker, and equal salary recommendations for the majority and minority leaders and cabinet secretaries.[20] Although the commission has not functioned since 1988, the linkages in place at that time have been perpetuated by the adjustments provided in most years since then (at least until 2007).

Legislative-judicial salary linkage has had an intermittent history in the 116 years since the federal judicial system took its present form.[21] Table A shows the number of years that statutes linked member salaries with those of district judges, those of circuit judges, or neither. For the first thirteen years after 1890, for example, members and district judges received the same salary. Appendix Table 2 provides all salaries and annual percentage changes. Appendix Table 3 presents those salary figures in 2007 dollars.

Table A–Salary Linkage, 1891-2006

Year	Judges Linked to Members		
	District	Circuit	Neither
1891-03	13		
1904-18			15
1919-24	6		
1925			1
1926-31	6		
1932-34			3
1935-45	11		
1946-54			9
1955-63	9		
1964			1
1965-68	4		
1969-1975		7	
1976			1
1977-78		2	
1979-86			8
1987-2006	20		
TOTAL (116 years)	69	9	38

Data drawn from Appendix Table 2.

Up to 1964, Congress matched its salaries with those of district judges for roughly two of every three years. After Congress created the Executive Schedule in 1964, until 1986, it matched its salaries with circuit judges or district judges for about two of every three years again. Only in 1987 did a firm member-judge linkage take hold: Congress has matched its salaries with district judges' salaries ever since. (During non-linkage years, member salaries were less than both district or circuit judges, except for 1907-18, 1925 and 1976.)

It is risky to read a linkage policy into the pre-1987 salary history. Linkage is not consistent, and salaries paid are especially misleading. For one thing, although the salaries of members and district judges through most of the 1920s and 1930s were $10,000, some federal judges' income during that period was not subject to the federal income tax.[22] For another, outside earning opportunities have varied. In 1952, when members earned less than district or circuit judges, a survey found significant numbers of members receiving business or professional income.[23] (Today, outside income, including from speeches, has been heavily curtailed. However, teaching remains permissible, and judges' schedules accommodate teaching more than members' schedules.)

Linkage as Compensation Policy

Raising legislative salaries has been perilous for members of Congress at least since the early 19th century, when scores of legislators lost their jobs after Congress adopted the Compensation Act of 1816. [24] Congress has regularly sought strategies to reduce the

Linkage, though, has little underlying rationale beyond members' search for a way to secure adequate pay in the face of unrelenting public hostility.

transparency of and avoid blame for congressional salary increases. Linkage has been the strategy in recent years. Linkage, though, has little underlying rationale beyond members' search for a way to secure adequate pay in the face of unrelenting public hostility. One finds little reference to linkage before the 1960s. Congressional hearings in 1926 on "Salaries of Judges,"[25] coming after Congress raised its salaries by 25 percent but took no action on judges' salaries, focused on comparing federal judicial salaries to those of state and foreign judges. There was a concerted push to raise legislative and judicial salaries in the early 1950s from unlinked levels set in 1947; the 600 pages of hearings and exhibits amassed by the Commission on Judicial and Congressional Salaries in 1953[26] and the Commission's report[27] stressed the need to raise judicial and legislative salaries after a long period of inflation. Although the Commission recommended raising member and district judge salaries to the same level, the record, including legislative hearings on the subject,[28] contains no reference to linkage per se except a provision in one little-discussed bill that member and district judge salaries be "be at the same rate."[29]

Reference to linkage appeared in 1967, when Congress created the quadrennial commission and told it to determine "the appropriate pay levels and relationships between and among the" high-level offices whose salaries it was to assess.[30] Every commission report but one recommended interbranch salary linkage but rarely explained why. The 1980 report said linkage placed special burdens on judges because they "consider their appointments to be lifetime commitments."[31] It quoted a *New York Times* editorial call for higher judicial salaries,[32] but not its call for delinking member and judge salaries.[33] The 1984 commission called linkage "unfortunate and illogical but . . . a reality." Only the 1986 report spent so much as a paragraph defending linkage—calling it important for symbolic reasons—but asked Congress to raise judicial and executive salaries if it decided it could not raise its own.[34] Only the 1976 report recommended delinkage, stressing differences in the likely career paths of judges, legislators and executives.[35]

The legislative history of the 1989 Ethics Reform Act, with its equal-salaries mandate to the never-appointed Citizens Commission, contains little on why Congress was so committed to matched salaries save for the fear that otherwise "Congress would never get another pay raise."[36] The Justice Department endorsed linkage but not if it would prevent a judicial salary increase.[37] In hearings before the Senate Governmental Affairs Committee in early 1989 on an ill-fated and highly controversial presidential recommendation for a 50% pay increase, seven of the 14 senators spoke to decoupling; six said they favored delinkage and another seemed open to the idea.[38] One witness, Fred Wertheimer of Common Cause, favored delinkage as well.[39] Only Ralph Nader opposed delinkage.[40]

The Case for Linkage Considered

Finding no cohesive rationale for salary linkage in the record, here we formulate and

then explore six policy questions that linkage implicates.

- Are the high-level linked positions basically alike, thus meriting the same salary?
- Does linkage provide salary increases to members better than does delinkage?
- Does linkage provide an even-handed way to restrain salaries of subordinate positions?
- Do equal salaries represent equality among the three branches?
- Do other jurisdictions link judicial and legislative salaries?
- Does public opinion favor linkage?

Perhaps the jobs of legislators, deputy secretaries and agency heads, and district judges are sufficiently comparable to justify salary equality. Rather than try to tweak the differences in the positions, it makes sense to match their salaries.

By even the simplest observations, though, a one-size-fits-all salary assessment is inappropriate. These officials differ in their range of responsibilities, the interests and sources consulted, the demand for specialized as opposed to general expertise, the effect of their actions on their job security, and their ability to explain actions to the press and public.

Moreover, as the Comptroller General said over 25 years ago, "there are few parallels between the career patterns [and] career expectations . . . of Members of Congress, judges, and executives."[41] Judges and deputy secretaries often take a salary reduction to enter government service. Judges forgo the potential for high salaries permanently (we hope), but most deputy secretaries serve relatively briefly and, once out of government, may well earn more than had they not served. For the legislator, as the 1976 commission said, the "psychic income is vastly different . . . and the risks and burdens include not only the loss of a job but of undeserved public obloquy."[42] Members who leave Congress, however, may receive healthy salaries in the private sector. All this led the 1976 commission to conclude that "[t]here is simply no justification for the continued automatic linkage of salary among these groups. Each should stand on its own, and with proper public understanding, the political consequences can be minimized."[43]

Perhaps the practical reason for linkage is reason enough. Members need adequate compensation, and Congress can raise the salaries of all three groups, as a package, more easily than it can raise its own, standing alone.

At best, the data are inconclusive on an association between linkage and member salary increases. Appendix Table 2 shows that from 1965 to 1986, member salaries were linked to district or circuit judges' salaries for 13 years and to neither for nine years. During that time, all salaries increased by over 150 percent. The increases from 1987 to 2007, 21 years of unbroken linkage between members' and district judges' salaries, were around 84 percent.

Those figures are somewhat deceiving, however, because the buying power for all three groups actually dropped by 25 percent or more during the first period. Table B

Executive agencies are offering salaries above $165,200 to significant numbers of individuals who have less responsibility and impact than agency heads, deputy secretaries, members and district judges.

shows salary changes for the two periods in 2007 dollars.

Table B—Changes in Salaries in 2007 Dollars for Two Periods

Salaries of	1965	1986	Percent Change	1987	2007	Percent Change
Members	$193,809	$139,441	-28%	$160,327	$165,200	+3%
District judges	$193,809	$146,126	-25%	$160,327	$165,200	+3%
Circuit judges	$213,189	$154,481	-28%	$170,180	$175,100	+3%
Worker wages*	$30,097	$32,162	+7%	$33,009	$38,505	+17%

Source: Appendix Table 3 and Social Security Administration, National Average Wage Indexing Series[44]

However, those figures are also deceiving because the major increases that occurred during the first period (in current dollars—what the public saw) occurred during periods of delinkage. Members achieved four increases of 10 percent or more during the period, but in three of those years (1965, 1977, and 1983) the increase was from a salary not linked to a judicial salary. In addition, a 47 percent increase in member salaries between 1981 and 1987 occurred during a period of delinkage. The only way to argue, from these data, that linkage boosts member salaries more than does delinkage would be to argue that, had the officials' salaries been consistently linked from 1965 to 1986, they would have escaped the loss of earning power that hit all three groups at essentially the same level. Put another way, for members to have achieved the same seven percent increase in buying power that worker wages showed—to go from $193,809 to $207,376 in 2007 dollars—their current dollar salary would have had to go from $30,000 to $110,680, not $75,100 as shown in Appendix Table 2. The public would not have tolerated that increase, with or without linkage.

Perhaps linkage provides an even-handed means of restraining salaries of subordinates to the principals whose salaries are linked. Salaries of those who report to district judges, for example, should be below the salaries of judges and of members and EL-IIs.

In fact, executive agencies are offering salaries above $165,200 to significant numbers[45] of individuals who have less responsibility and impact than agency heads, deputy secretaries, members and district judges. That is because Congress has exempted specific executive agencies from government-wide pay and personnel restrictions in title 5 of the U.S. Code. A few examples include the Veterans Affairs Department's basic-market-performance pay system of compensation for physicians and dentists, established pursuant to a 2004 statute;[46] the department has recently advertised for numerous positions with maximum salaries in the range of $175,000 to $255,000 (and in some cases higher).[47] The Commodity Futures Trading Commission, pursuant to a 2002 statute,[48] recently sought a Deputy General Counsel (Litigation) with an annual salary up to $208,994[49] and a Secretary to the Commission and an Accounting Officer (both up to $180,634).[50] A 1998 statute[51] said the Internal Revenue Service could fix salaries of up to 40 officials at the Vice President's salary (currently $215,700). Salaries are substantially

higher for members of the Public Corporation Accountability Oversight Board, created under the 2002 Sarbanes-Oxley Act. In 2003, the Board's Chairman was paid $556,000; the other members, $452,000. (The Board is technically a private corporation—hence the salaries higher than the President's—but performing public functions under Securities and Exchange Commission oversight.)[52] Recent SEC vacancy announcements, pursuant to a 2002 statute,[53] seek a Supervisory Attorney-Adviser[54] and a Trial Attorney[55] with maximum salaries of $185,393 and $173,384 respectively.

Congress has not permitted these salaries because it believes government economists, lawyers and physicians perform jobs more vital to the nation than deputy secretaries, district judges and members of Congress. Congress does not believe that the attorney litigating the government's securities action is more important than the judge who presides over it. Rather, Congress has permitted some executive agencies to operate in the real world of recruitment, but fear of voter hostility precludes Congress's applying the same understanding to those who make the nation's laws and apply them through executive policy and judicial decisions.

Perhaps member, district judge and EL-II salaries should be matched for symbolic reasons.

The only substantive argument for linkage that we could find was in the report of the 1986 quadrennial commission, which acknowledged that linkage had depressed judicial and executive salaries but said the Constitutional balance of "three equal branches of government" means that "[l]ower pay for Congressmen may risk implying lesser status to Congress than to the highest ranks of the judicial or executive branches." On this point, the commission relied heavily on a submission by a coalition of attorneys,[56] which cited the "Framers' goal" that members "be equal to officers of the other two branches in terms of their stature, prestige, overall quality, and integrity." Implementing this goal, said the attorneys, requires "maintain[ing] congressional Members' salaries at a level equal to Level II Executives and circuit court judges."[57]

If salary equality were the Framers' mechanism for proclaiming legislative equality in stature and prestige, one might be surprised to find no reference to it in the convention debates[58] or *The Federalist*.[59] Rather, the Constitution establishes the equality of Congress by the authority vested in it by Article I. Legislators have traditionally received lower salaries than the highest ranks of the executive and judicial branches. Far from implying "lesser status," this practice represents a crude effort to accommodate variations among the senior ranks of government. If salary were a surrogate for legislative equality, one might conclude that Congress meant to reduce its stature in 1989 by matching its salary with district judges' salaries, rather than maintain the member-circuit judge match that had been in place off and on since 1965.

The most apropos reference to legislative salaries at the constitutional convention was Roger Sherman's. He "was not afraid that the Legislature would make their own wages too high; but too low."[60] The 1986 commission, despite its call for equal salaries, had such a fear in mind. If Congress declines "to raise its own pay," its report said, "it is

Comparisons to states are of limited utility because states pay judges significantly more than legislators, especially where legislative service is part-time.

better to limit the unfairness thereby caused and not impose inadequate pay levels on the two other branches, thus compounding the harm to our government and our country."[61]

Perhaps other governments use linkage or salary equality to set judicial salaries.

Comparisons to states are of limited utility because states pay judges significantly more than legislators, especially where legislative service is part-time.[62] In some states—New York and New Jersey for example—legislators traditionally do not raise judicial salaries unless they raise their own as well.[63] A recent *National Law Journal* review of state judicial salary developments nationally, however, did not identify linkage as a factor generally in state legislative consideration.[64]

Jurisdictions that use salary-setting mechanisms (roughly akin to the federal quadrennial commissions or the statutory mechanisms for annual salary adjustments) do not prescribe formulas for linking judicial or legislative salaries. An Oklahoma statute, for example, tells its Board on Judicial Compensation to "consider," among other things, the "compensation of other state, county, and municipal public officials."[65] Utah tells its State Executive and Judicial Compensation Commission to "formulate recommendations . . . based upon factors such as . . . wages paid in other comparable public and private employment within this state, and other states similarly situated."[66] Although the Delaware Code prescribes no criteria for the Delaware Compensation Commission,[67] the Commission said that one of the principles it adopted to guide its work was that "[s]ome members of the Judiciary may be paid more than the Governor"[68]—and indeed Delaware pays the Supreme Court more than the Governor.[69]

Judges in Australia, Canada and Great Britain receive salaries that are substantially greater than legislator salaries.[70] Australia has created a statutory Remuneration Tribunal to set judicial salaries, subject to parliamentary disallowance. None of the criteria the statute directs the Tribunal to consider relate to legislative salaries, which are determined by Parliament.[71] Canada says its Judicial Compensation and Benefits Commission's recommendations[72] should reflect economic and government financial conditions, the need to attract good judges, and "the role of financial security in ensuring judicial independence."[73] In 2001, Parliament approved raising its members' salaries to 50% of the Chief Justice's salary, but it repealed that highly controversial measure[74] in 2005.[75] Great Britain's Office of Manpower Economics says the recommendations of the Review Body on Senior Salaries for judicial, senior civilian and senior armed forces positions should reflect "the need to maintain broad linkage between the remuneration of the three main remit groups [which do not include Parliament], while allowing sufficient flexibility to take account of the circumstances of each group." [76]

Perhaps public opinion generally supports linkage or salary equality.

The closest surrogate to current public attitudes on the arcane topic of linkage are editorials and newspaper opinion pieces in response to Chief Justice Roberts's call in

January 1, 2007 for increased judicial salaries.

We know of 11 that reference linkage. Eight oppose it, and two are skeptical, regardless of their position on increasing judicial salaries. A signed editorial in Nevada, for example, said that "[o]ne of the problems is that the judicial salaries need to be set by the legislative branch and approved by the president. If the people are upset with their senators and congressmen—when does that ever happen?—one of the last things the Congress votes for is their own pay raises, which would include those for judges. Thus, nothing ever happens."[77] A *USA Today* editorial, mildly supportive of a pay raise, was more direct about linkage: "We also don't think judges' pay should be held hostage to congressional egos and pay-raise politics."[78] The only piece we encountered that stands up for linkage was by a *National Review* columnist: "it will be an uphill argument—and rightly so—to make the case that judges ought to make more than senators and representatives."[79]

Conclusion

The electoral jeopardy that legislators perceive in setting adequate salaries for themselves has prevented Congress from finding a solution to the more fixable problems of identifying appropriate judicial pay levels. Brookings Institution workforce economist Gary Burtless told the House Government Reform Subcommittee on Workforce and Agency Operations last year that "[f]ederal compensation of top officials is determined by political logic rather than a clear-eyed assessment of the personnel needs of the government."[80] The National Commission on Public Service in 2003 asked "Congress [to] break the statutory link between the salaries of members of Congress and those of judges and senior political appointees" because "executive and judicial salaries must be determined by procedures that tie them to the needs of the government, not the career-related exigencies of members of Congress."[81] As far back as 1980, labor economists Arnold Weber and Robert Hartman stated that "linkage has become an impediment to intelligent paysetting throughout the federal government."[82]

As we showed, the empirical evidence that linkage serves to boost legislative pay is not nearly as clear-cut as is widely believed. Even robust evidence, however, would not dissuade us from seeing linkage as an unfortunate policy mechanism. Even if linkage may under some conditions and to some extent insulate lawmakers against populist demagoguery, it will do so only at the price of exacerbating the difficulties of recruiting and retaining a highly-skilled workforce for vital government positions. The profusion of special statutes authorizing executive staff salaries higher than those of linked officials suggests that this is already happening.

Congress's reliance on linkage as its pay-booster reflects an implicit assumption that Congress, and the country, cannot have a clear-eyed, intelligent debate about legislative pay. That assumption is understandable in light of the hostility that always gets directed toward the institution and toward individual members whenever a proposal for

reasonable salary adjustments is on the table. But the threat of demagoguery these days is hardly limited to compensation. However real and lamentable, it cannot serve as a blanket dispensation from a reasoned and responsible legislative debate and decision-making process. We should not surrender the demand for such a debate to an unqualified cynicism about the state of our politics.

The views expressed in this piece are those of the authors and should not be attributed to the staff, officers or trustees of the Brookings Institution or AEI. Thanks to Andrew Lee (Brookings) and Harriet McConnell (AEI) for research assistance, to Juliet Bui (Brookings) for production and layout, to Sarah Chilton and Laura Mooney of the Brookings Library, and to Sarah Binder and Gary Burtless for comments on an earlier draft.

APPENDICES

Appendix Table 1 – Federal Judges' Terms, Salaries, Numbers
As of late March 2007

	Appointed by	Term	Salary [a]	Positions [b]	Active Judges [b]	Senior/ Recalled Judges [b]
Chief Justice [c]	President/Senate	Life	$212,100	1	1	
Associated Justices	"	Life	$203,000	8	8	1
Court of Appeals Judges	"	Life	$175,100	179	164	106
District Court Judges	"	Life	$165,200	674	639	368
District Court Magistrate Judges (full-time)	District Judges	8 years	$151,984	503	489	23
Magistrate Judges (part-time)	"	4 years	<$70,166	48	45	14
Bankruptcy Judges	Court of Appeals	14 years	$151,984	352	339	25
Court of International Trade Judges	President/Senate	life	$165,200	9	9	4
Court of Federal Claims Judges	President/Senate	15 years	$165,200	16	16	15

[a] Salary data from Appendix Table 2 and from Administrative Office of United States Courts

[b] Judgeship data from 28 U.S.C. §§1, 44, 133(a), 251(a), 171(a), and 133(a) and from the Administrative Office of the U.S. Courts. Number of judges from the Federal Judges Biographical Data Base, http://www.fjc.gov/public/home.nsf/hisj, and from the Administrative Office. Statutory age and eligibility requirements let life-tenure and Federal Claims Court judges retire on "senior status" and earn the same salary as regular judges if they do a prescribed amount of work.[83] Retired bankruptcy and magistrate judges may be temporarily "recalled" to service.[84]

[c] The Chief Justice is the only chief judge who receives a different salary than other members of his or her court.

Appendix Table 2—Salaries for Members, Circuit Judges and District Judges, 1891-2007
(rev. 5/24/07)

Year	Members	Percent Change	Circuit Judges	Percent Change	District Judges	Percent Change
1891-06	$5,000		$6,000		$5,000	
1903-06	$5,000	0.0%	$7,000	16.7%	$6,000	20.0%
1907-18	$7,500	50.0%	$7,000	0.0%	$6,000	0.0%
1919-24	$7,500	0.0%	$8,500	21.4%	$7,500	25.0%
1925	$10,000	33.3%	$8,500	0.0%	$7,500	0.0%
1926-31	$10,000	0.0%	$12,500	47.1%	$10,000	33.3%
1932-34*	$9,000	-10.0%	$12,500	0.0%	$10,000	0.0%
1935-45	$10,000	11.1%	$12,500	0.0%	$10,000	0.0%
1946	$10,000	0.0%	$17,500	40.0%	$15,000	50.0%
1947-54	$12,500	25.0%	$17,500	0.0%	$15,000	0.0%
1955-63	$22,500	80.0%	$25,500	45.7%	$22,500	50.0%
1964	$22,500	0.0%	$33,000	29.4%	$30,000	33.3%
1965-68	$30,000	33.3%	$33,000	0.0%	$30,000	0.0%
1969-74	$42,500	41.7%	$42,500	28.8%	$40,000	33.3%
1975	$44,600	4.9%	$44,600	4.9%	$42,000	5.0%
1976	$44,600	0.0%	$46,800	4.9%	$44,000	4.8%
1977	$57,500	28.9%	$57,500	22.9%	$54,500	23.9%
1978	$57,500	0.0%	$60,700	5.6%	$57,500	5.5%
1979	$60,700	5.6%	$65,000	7.1%	$61,500	7.0%
1980	$60,700	0.0%	$70,900	9.1%	$67,100	9.1%
1981	$60,700	0.0%	$74,300	4.8%	$70,300	4.8%
1982	$69,700	14.8%	$77,300	4.0%	$73,100	4.0%
1983	$69,800	0.1%	$77,300	0.0%	$73,100	0.0%
1984	$72,600	4.0%	$80,400	4.0%	$76,000	4.0%
1985-86	$75,100	3.4%	$83,200	3.5%	$78,700	3.6%
1987-89	$89,500	19.2%	$95,000	14.2%	$89,500	13.7%
1990	$98,600	7.9%	$102,500	7.9%	$96,600	7.9%
1991	$125,100	29.5%	$132,700	29.5%	$125,100	29.5%
1992	$129,500	3.5%	$137,300	3.5%	$129,500	3.5%
1993-97	$133,600	3.2%	$141,700	3.2%	$133,600	3.2%
1998-99	$136,700	2.3%	$145,000	2.3%	$136,700	2.3%
2000	$141,300	3.4%	$149,900	3.4%	$141,300	3.4%
2001	$145,100	2.7%	$153,900	2.7%	$145,100	2.7%
2002	$150,000	3.4%	$159,100	3.4%	$150,000	3.4%
2003	$154,700	3.1%	$164,000	3.1%	$154,700	3.1%
2004	$158,100	2.2%	$167,600	2.2%	$158,100	2.2%
2005	$162,100	2.5%	$171,800	2.5%	$162,100	2.5%
2006	$165,200	1.9%	$175,100	1.9%	$165,200	1.9%
2007**	$165,200	0.0%	$175,100	0.0%	$165,200	0.0%

* Congressional salaries from 1932 to 1934 fluctuated annually and even more than annually, but generally in the $8,500-9,500 range.
** As of early April, Congress was considering legislation to permit judges to receive the scheduled annual adjustment.
Source for judges' salaries: *Judicial Salaries Since 1968*, http://www.uscourts.gov/salarychart.pdf and *Judicial Salaries, Biographical Directory of Federal Judges*, http://www.fjc.gov/public/home.nsf/hisj
Source for legislators' salaries: *Judicial Salaries Since 1968*, cited supra, and Paul Dwyer, "Salaries of Members: A List of Payable Rates and Effective Dates, 1789-2006," Congressional Research Service Report, Order Code 97-1-11 COV, Updated April 18, 2006.

Appendix Table 3—Salaries for Members, Circuit Judges and District Judges, 1891-2007 Current Dollars and 2007 Dollars*

Year	Members	2007 Dollars	Circuit Judges	2007 Dollars	District Judges	2007 Dollars
1913	$7,500	$154,166	$7,000	$143,888	$6,000	$123,333
1914		$152,624		$142,449		$122,099
1915		$151,113		$141,039		$120,890
1916		$140,022		$130,687		$112,018
1917		$119,238		$111,289		$95,390
1918		$101,076		$94,337		$80,861
1919		$88,222	$8,500	$99,985	$7,500	$88,222
1920		$76,312		$86,487		$76,312
1921		$85,265		$96,634		$85,265
1922		$90,848		$102,961		$90,848
1923		$89,254		$101,154		$89,254
1924		$89,254		$101,154		$89,254
1925	$10,000	$116,285		$98,842		$87,214
1926		$114,971	$12,500	$143,714	$10,000	$114,971
1927		$116,953		$146,192		$116,953
1928		$119,005		$148,757		$119,005
1929		$119,005		$148,757		$119,005
1930		$121,856		$152,320		$121,856
1931		$133,881		$167,351		$133,881
1932	$9,000	$133,685		$185,674		$148,539
1933		$140,884		$195,672		$156,538
1934		$136,678		$189,831		$151,863
1935	$10,000	$148,539		$185,674		$148,539
1936		$146,402		$183,003		$146,402
1937		$141,319		$176,648		$141,319
1938		$144,326		$180,407		$144,326
1939		$146,402		$183,003		$146,402
1940		$145,356		$181,696		$145,356
1941		$138,435		$173,043		$138,435
1942		$124,846		$156,058		$124,846
1943		$117,629		$147,037		$117,629
1944		$115,624		$144,531		$115,624

Year	Members	2007 Dollars	Circuit Judges	2007 Dollars	District Judges	2007 Dollars
1945		$113,055		$141,319		$113,055
1946		$104,358	$17,500	$182,627	$15,000	$156,538
1947	$12,500	$114,069		$159,697		$136,883
1948		$105,549		$147,769		$126,659
1949		$106,880		$149,632		$128,256
1950		$105,549		$147,769		$126,659
1951		$97,836		$136,970		$117,403
1952		$95,990		$134,386		$115,188
1953		$95,271		$133,379		$114,325
1954		$94,563		$132,388		$113,475
1955	$22,500	$170,848	$25,500	$193,628	$22,500	$170,848
1956		$168,336		$190,780		$168,336
1957		$162,944		$184,670		$162,944
1958		$158,433		$179,558		$158,433
1959		$157,345		$178,324		$157,345
1960		$154,687		$175,312		$154,687
1961		$153,135		$173,553		$153,135
1962		$151,613		$171,829		$151,613
1963		$149,632		$169,583		$149,632
1964		$147,701	$33,000	$216,628	$30,000	$196,935
1965	$30,000	$193,809		$213,189		$193,809
1966		$193,809		$213,189		$193,809
1967		$182,784		$201,062		$182,784
1968		$175,430		$192,973		$175,430
1969	$42,500	$233,660	$42,500	$235,660	$40,000	$221,797
1970		$222,905		$222,905		$209,793
1971		$213,548		$213,548		$200,987
1972		$206,907		$206,907		$194,736
1973		$194,791		$194,791		$183,332
1974		$175,430		$175,430		$165,111
1975	$44,600	$168,700	$44,600	$168,700	$42,000	$158,865
1976		$159,509	$46,800	$167,377	$44,000	$157,363
1977	$57,500	$193,089	$57,500	$193,089	$54,500	$183,015
1978		$179,466	$60,700	$189,454	$57,500	$179,466
1979	$60,700	$170,143	$65,000	$182,196	$61,500	$172,386
1980		$149,908	$70,900	$175,098	$67,100	$165,713
1981		$135,890	$74,300	$166,336	$70,300	$157,382
1982		$128,004	$77,300	$163,010	$73,100	$154,133
1983	$69,800	$142,613		$157,936		$149,355
1984	$72,600	$142,195	$80,400	$157,472	$76,000	$148,854
1985	$75,100	$142,033	$83,200	$157,352	$78,700	$148,842
1986		$139,441		$154,481		$146,126

Year	Members	2007 Dollars	Circuit Judges	2007 Dollars	District Judges	2007 Dollars
1987	$89,500	$160,327	$95,000	$170,180	$89,500	$160,327
1988		$153,957		$163,418		$153,957
1989		$146,880		$155,906		$146,880
1990	$96,600	$150,406	$102,500	$159,592	$96,600	$150,406
1991	$125,100	$186,914	$132,700	$198,270	$125,100	$186,914
1992	$129,500	$187,834	$137,300	$199,148	$129,500	$187,834
1993	$133,600	$188,149	$141,700	$199,556	$133,600	$188,149
1994		$183,451		$194,574		$183,451
1995		$178,395		$189,211		$178,395
1996		$173,279		$183,785		$173,279
1997		$169,392		$179,662		$169,392
1998	$136,700	$170,665	$145,000	$181,027	$136,700	$170,665
1999		$166,977		$177,115		$166,977
2000	$141,300	$166,983	$149,900	$177,146	$141,300	$166,983
2001	$145,100	$166,729	$153,900	$176,841	$145,100	$166,729
2002	$150,000	$169,677	$159,100	$179,970	$150,000	$169,677
2003	$154,700	$171,094	$164,000	$181,380	$154,700	$171,094
2004	$158,100	$170,319	$167,600	$180,553	$158,100	$170,319
2005	$162,100	$168,905	$171,800	$179,012	$162,100	$168,905
2006	$165,200	$166,756	$175,100	$176,749	$165,200	$166,756
2007		$165,200		$175,100		$165,200

Current salary dollars from Appendix Table 2. Conversion to 2007 dollars using the inflation calculator at the Bureau of Labor Statistics website, http://www.bls.gov/.

[1] The National Commission on the Public Service, *Urgent Business for America* (2003) pp. 22,23, 25

[2] For district judge salaries, see Appendix Table 2 and sources cited. For Court of International Trade judges, see 28 U.S.C. A. §252, Historical and Statutory Notes. For Federal Claims Court judges, see 28 U.S.C. §172(b).

[3] 28 U.S.C. § 153(a) and §§633(c) and 634(a).

[4] See, for the Supreme Court 28 U.S.C. §5; for courts of appeals, §44(c); for district courts, 28 U.S.C. §135; for International Trade Court, §252.

[5] 3 U.S.C. § 104 (Vice-President) and 5 U.S.C. §5318 (Executive Schedule appointees)

[6] 2 U.S.C. §31

[7] 5 U.S.C. 5303

[8] P.L. 97-92, §140, Dec. 15, 1981; 95 Stat. 1183, 1200, made permanent in Act of Nov. 28, 2001, making appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies, P.L. 107-77, Title VI, §625; 115 Stat. 748 at 803.

[9] *U.S. v. Will*, 449 U.S. 200, esp. at 225-26 and 229-230 (1980)

[10] Barbara L. Schwemle, "Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries," Congressional Research Service Report RL33245 (February 15, 2007) pp. 2-4.

[11] P.L. 90-206, §225, 81 Stat. 613, 642, Dec. 16, 1967

[12] Sharon S. Gressle, "Commission on Executive, Legislative, and Judicial Salaries: A Historical Summary," Congressional Research Service Report No. 86-1050 GOV (January 8, 1987) tables 1-3 at pp. 31-42.

[13] Ethics Reform Act of 1989, PL 101-194, §701(a) (2); 2 U.S.C. §351.

[14] Barbara L. Schwemle, "Salary Linkage: Members of Congress and Certain Federal Executive and Judicial Officials," Congressional Research Service Report RS20388 (Jan. 31, 2007).

[15] 5 U.S.C. § 5313

[16] Revised Continuing Appropriations Resolution, P.L. 110-005, §115, 121 Stat. 8 (Feb. 15, 2007).

[17] S. 197, To authorize salary adjustments for justices and judges of the United States for fiscal year 2007 (passed the Senate, January 8, 2007, pending in the House Judiciary Committee as of mid-April).See also §3310 of H.R. 1591, U.S. Troop Readiness, Veterans' Health, and Iraq Accountability Act, as passed by the Senate, March 29, 2007, which would also authorize judicial salary adjustments. The version passed by the House did not contain a similar provision, and a veto is likely in any event on matters unrelated to judicial salaries.
[18] Executive Schedule Salary Table, viewed March 23, 2007 at http://www.opm.gov/oca/07tables/html/ex.asp.
[19] Ethics Reform Act cited supra in note 13, §701(i). 2 U.S.C. §362(A)(iii)
[20] 2 U.S.C. §362(A) (i) and (ii).
[21] Act of March 3, 1891, 26 Stat. 826. See in general, R. Wheeler and C. Harrison, *Creating the Federal Judicial System* esp. (3rd edition, 2005), especially p. 47.
[22] *O'Malley v. Woodrough*, 307 U.S. 277 (1939)
[23] A *New York Times* survey reported that 80 percent of the House members and two-thirds of the Senators responding said they received income beyond their salary, and that the mix between investments and business/professional income was half and half. About half in each house said the income received was less than their legislative salaries. The response rate was over 30 percent. "Confidential Questionnaire to Members of Congress for the *New York Times Magazine*," in Commission on Judicial and Congressional Salaries, Hearings before the Commission, Pursuant to Public Law 220, 83rd Cong., Senate Doc. 104 (Dec. 15, 16, and 17, 1953), p. 360.
[24] See William T. Bianco; David B. Spence; John D. Wilkerson, "The Electoral Connection in the Early Congress: The Case of the Compensation Act of 1816," *American Journal of Political Science*, Vol. 40, No. 1. (Feb., 1996), pp. 145-171.
[25] "Judicial Salaries," Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 2d sess., on H.R. 9221, December 13, 1924, at pp. 83 ff in Joint Hearing before the Committees on the Judiciary, 69th Cong., 1st sess., on H.R. 7907 (January 19, 1926)
[26] Hearings cited supra in note 23.
[27] Report of the Commission on Judicial and Congressional Salaries, H. Doc. No. 300, 83rd Cong., 2d sess., January 15, 1954, reprinted in Hearings before a Subcommittee of the Committee on the Judiciary, Senate, 84th Cong., 1st sess., on Salaries of Justices and Judges of United States Courts and Members of Congress, S. 165, S. 462, and S. 540 at 31, January 25 and 28, 1955.
[28] Hearing before a Subcommittee of the Committee on the Judiciary, Senate, 83rd Cong., 1st sess., on Salaries of Members of Congress, Federal Judges, and United States Attorneys, S. 5 (April 22, 1953).
[29] S. 540, "A Bill to increase the salaries of judges of the United States courts, and to provide that Members of Congress shall receive salary comparable to that of judges of the United States district courts," 84th Cong., 1st sess, in Hearings cited supra in note 27, p. 4.
[30] P.L. 90-206, §225 (f) (1), (i), 81 Stat. 613, 643, Dec. 16, 1967
[31] *Report of the Commission on Executive, Legislative, and Judicial Salaries* (1980) p. 23
[32] Ibid, p. 29.
[33] "Keep the Federal Courts Special," (editorial) *New York Times*, Aug. 24, 1980.
[34] *Quality Leadership, Our Government's Most Precious Asset, Report of the Commission on Executive, Legislative, and Judicial Salaries* (1986) p. 27.
[35] *Report of the Commission on Executive, Legislative, and Judicial Salaries* (1976), pp. 3-4, 35-36
[36] Rep. Carlos Moorhead, "Judicial Independence: Discipline and Conduct," Hearings before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 101st Cong., 1st sess. on H.R. 1620, HR. 1930, and H.R. 2181 (1989) p. 386.
[37] Prepared Statement of Thomas M. Boyd, Director, Office of Policy Development, U.S. Department of Justice, in "Judicial Independence: Discipline and Conduct," in Hearings cited supra in note 36, pp. 306, 307
[38] See statements in Hearings before the Committee on Governmental Affairs, Senate, 1st sess., on the Report of the 1989 Commission on Executive, Legislative, and Judicial Salaries (January 31 and February 1, 1989) Senators Stevens (p. 5), Roth (p.9), Wilson (p. 29), Pressler (p. 64), Humphrey (p. 65), and Glenn (p. 70), and Sasser (p. 23).
[39] Hearings cited supra at note 38, p. 124.
[40] Hearings cited supra at note 38, p. 79.
[41] Statement of Elmer B. Staats, before the Quadrennial Pay Commission Task Force of the Committee on Post Office and Civil Service, House of Representatives, February 18, 1981, pp. 6-7 (on file with authors).
[42] Report cited supra at note 35, p. 35.
[43] Report cited supra at note 35, p. 36

[44] Computed from the Social Security Administration's National Average Wage Indexing Series, available at http://www.ssa.gov/OACT/COLA/awiseries.html. Figure shown for 2007 is an estimate for 2006, provided by the Office of the Actuary, Social Security Administration, to the General Counsel's office of the Administrative Office of the U.S. Courts, and provided to us by that office. 2007 dollars calculated from Bureau of Labor Statistics Inflation Calculator available at http://www.bls.gov/.

[45] Hearing before the Subcommittee on Health of the Committee on Veterans' Affairs, on Veterans Affairs Physician and Dentist Compensation Issues, House of Representatives, 108th Cong., 1st sess. (Oct. 21, 2003) (subcommittee chair reported that the Department advised him of 6,000 physician positions in the department, 950 of which were unfilled), p. 2.

[46] Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004, P.L. 108-445. Information on the statutes and vacancy announcements discussed in this section was provided on request by the Office of the General Counsel of the Administrative Office of the United States Courts.

[47] See Veterans Health Administration Job Announcement Numbers T38-07-110-JB;07-025; T-38-06-75; T38-07-092-LS; 06-14; 557-07-37KC; MPA-07-13; 674-T38-2007-2; 07-0935; PVN-38-07-5; 07-P-107; 25-07; 07-0934; 07-003-HR

[48] Farm Security and Rural Investment Act of 2002, P.L. 107-171, title X, § 10702.

[49] CFTC Job Announcement 07-005

[50] CFTC Job Announcements 07-006 and 07-007

[51] Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206.

[52] Rebecca Byrne, Accountants Board Tin Ear Now Golden, The Street, Jan. 13 2003 (http://www.thestreet.com/markets/rebeccabyrne/10062297.html)

[53] Investor and Capital Markets Fee Relief Act, P.L. 107-123, § 8.

[54] Securities and Exchange Commission Announcement Number 07-085-TR

[55] Securities and Exchange Commission Announcement Number 07-064-EH

[56] Compare "Setting Congress adrift on the pay issue is politically impractical, and will, in any event, disserve the national interest." in *Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Government Officials, A Report to the Commission on Executive, Legislative, and Judicial Salaries*, Submitted by Kaye, Scholer, Fierman, Hays & Handler and Dickstein, Shapiro & Morin, with the Support of the Corporate Committee for Fair Compensation of the Federal Judiciary and the American College of Trial Lawyers (1986) p. 72, with "Setting Congress adrift on the pay issue is politically impractical and will not serve the national interest well." Commission report cited supra in note 34 p. 27

[57] *Promises Made* cited in note 56 supra, p. 72.

[58] Max Farrand, 2 *The Records of the Federal Convention of 1787* (1937) pp. 290-293 (debates on the legislative compensation clause)

[59] *The Federalist*, esp. No. 59 ("Concerning the Power of Congress to Regulate the Election of Members,") and Nos. 60-61 ("The Same Subject Continued") (Rossiter ed., 1961), pp. 359-374.

[60] Farrand cited at supra note 58, p. 291.

[61] Report cited supra in note 34, p. 27.

[62] In 2005, forty three states paid legislators $50,000 or less. California was the highest at $110,880. National Conference of State Legislatures, "Legislator Compensation 2005, Updated 2005, Updated Nov. 1, 2005," at http://www.ncsl.org/programs/legismgt/about/05salary.htm. The current salary range for state general jurisdiction trial judges is from $94,093 to $168,100. National Center for State Courts, "Survey of Judicial Salaries," March 1, 2007, available at http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal070106Pub.pdf)

[63] John Caher, "Pay Raise for N.Y. Judges Gets Boost in Spitzer's First Budget," *New York Law Journal*, February 1, 2007; "Find a way to up judges' pay; legislature should revive plan for raises" (editorial), *Newsday* April 4, 2007; "Judges Should Get Raises," (editorial) *Star-Ledger* (New Jersey), Jan. 3, 2007

[64] Amanda Bronstad, "States Push for Judicial Pay Raises," *National Law Journal*, March 5, 2007.

[65] OKLA. STAT. ANN. tit. 20, § 3.3 (West Supp. 2007)

[66] UTAH CODE ANN. § 67-8-5 (2000 & Supp. 2006)

[67] DEL. CODE ANN. §§3301-3303 (2007).

[68] *Delaware Compensation Commission 2005, Final Report* at 8, January 11, 2005.

[69] The 2006 salary for the Delaware chief justice was $194,000 and for associate justices, $184,000. "Survey of Judicial Salaries" cited supra in note 62. The governor's salary in 2005 was $114,000, according to http://www.delawarepersonnel.com/class/, "Executive Branch Salary Survey Data Part 1."

[70] Judicial salaries in Australia are almost all over $300,000 (about $250,000 US). Members of Parliament base salary in 2006 was $118,950 ($98,534 US). See "Determination 2006/10", at http://www.remtribunal.gov.au/judicialRelatedOffices/default.asp?menu=Sec3&switch=on.

In Canada, appellate and principal trial court judge salaries are in the $230,000-$260,000 range ($204,000-231,000 US). Judges Act (RS., 1985, c.J-1, sections 10-20, Act current to Feb. 8, 2007, available at http://laws.justice.gc.ca/en/showdoc/cs/J-1/bo-ga:s_1:bo-ga:s_2/20070323?command=HOMF&caller=SI&fragment=Judges%20Act&search_type=all&day=23&month=3&year=2007&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50&page=2). As indicated in the text and note 75, infra, members of Parliament were forced to retreat from an effort to set their salaries at about $160,000 ($142,000 US).
In Great Britain, government salary recommendations for 2007 are £98,900 for district judges, with higher salaries for other judges, and £60,675 (US$119,372) for members of Parliament. Anthony Brown and Jill Sherman, "Health Workers are the biggest losers as Chancellor takes iron grip on pay awards," *The Time of London* March 2, 2007 at News-11.
Conversions as of late March, calculated through http://www.xe.com/ucc/convert.cgi.

[71] Information and relevant statutes and implementing instruments are available at http://www.remtribunal.gov.au/judicialRelatedOffices/default.asp?menu=Sec3&switch=on .

[72] Department of Justice, Canada, Newsroom Backgrounder, "Judicial Compensation and Benefits Process," available at http://www.justice.gc.ca/en/news/nr/2004/doc_31314.html

[73] Judges Act (RS, 1985, c.J-1, 2007), sec. 26, as viewed at http://laws.justice.gc.ca/en/showdoc/cs/J-1/bo-ga:s_1:bo-ga:s_2/20070323?command=HOMF&caller=SI&fragment=Judges%20Act&search_type=all&day=23&month=3&year=2007&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50&page=2

[74] See Hansard Debates on Bill C-28, June 5, 2001 at time interval 1305, available at : http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Pub=Hansard&Mode=1&Parl=37&Ses=1&Doc=72#LINK180

[75] Parliament of Canada Act, as amended April 21, 2005, 38th Parliament, 1st sess, available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2334093&Language=e&Mode=1. The prefatory bill summary says that "[s]alaries and allowances will no longer be adjusted by reference to the increase in the annual salary of the Chief Justice . . . but in accordance with the index of the average percentage increase in base-rate wages for each calendar year." Legislators declined to set their salaries at even $160,000 (about $142,000 US), half of the salary of the Chief Justice of Canada. Judges Act (RS., 1985, c.J-1, section 9, Act current to Feb. 8, 2007, available at address in supra note 73). See also Greg Weston, "The 20% Solution," *The Ottawa Sun*, June 18, 2004.

[76] Office of Manpower Economics, "Senior Salaries Review Body," at http://www.ome.uk.com/review.cfm?body=4

[77] Brian Greenspun, "Brian Greenspun on Getting What You Pay For, Even When it Comes to Judges," *Las Vegas Sun*, Feb. 23, 2007

[78] "There Oughta be a Law," (editorial) USA Today, Jan. 9, 2007. Other editorials or op-eds referencing linkage (all 2007): "Is Current Pay Fair? You Be the Judge," *Republican* (Massachusetts), January 3; "Judges Should Get Raises," *Star-Ledger* (New Jersey), January 3; "Bench Warranted: The Federal Judiciary Deserves a Pay Raise," *Akron Beacon Journal*, January 4; "Lagging Judicial Pay," *New York Times* January 5; "Don't Pay Supes Like Members of Congress," *Los Angeles Times*, January 7; "Chief Justice Off Mark on Judges' Earnings, Judicial Pay Shouldn't be Tied to Congressional Salaries," *Miami Herald*, January 8; Dahlia Lithwick, "O Mighty Crisis" and "Counting Cash," *Slate*, January 2 and February 14. (The last two items seem skeptical of linkage but do not directly advocate abandoning it.)

[79] Matthew J. Franck, "The Unpersuasive Chief," *National Review* January 2, 2007.

[80] G. Burtless, "The Erosion of Compensation for Federal Executives and Judges," Testimony before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, U.S. House of Representatives, September 20, 2006 at 1, available at http://www.brookings.edu/views/testimony/burtless/20060920.htm

[81] Report cited supra in note 1, p. 25.

[82] Arnold Weber and Ronald Hartman, "The Ways and Means of Compensating Federal Officials," in *The Rewards of Public Service. Compensating Top Federal Officials* 1, 14 (1980, Hartman and Arnold, eds).

[83] 28 U.S.C. §§371 and 178

[84] 28 U.S.C. § 375

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National Association of Criminal Defense Lawyers

March 16, 2007

The Honorable Harry Reid
Majority Leader
528 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
361-A Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House
235 Cannon House Office Building
Washington, DC 20515

The Honorable John Boehner
House Minority Leader
1011 Longworth House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Chairman, House Judiciary Committee
2426 Rayburn Building
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member, House Judiciary Committee
2409 Rayburn House Office Building
Washington, DC 20515

Re: Compensation for the Federal Judiciary

Dear Chairmen, Senators, and Representatives:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to voice our strong support for a significant salary increase for the federal judiciary. We concur with Chief Justice Roberts that the inadequacy of federal judicial salaries has reached the crisis point.

Judicial salaries have stagnated for far too long. Federal judges have been denied COLA's in 6 of the past 12 years. With only two meaningful pay increases in the past 20 years, the judiciary's real pay has decreased 25 percent since 1969. Accordingly, the National Commission on Public Service (the "Volcker

Re: Compensation for the Federal Judiciary

Commission") declared that an "immediate and substantial increase" in judicial salaries should be Congress's first priority.

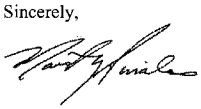
It goes without saying that federal judges could easily make significantly more as partners at major law firms, but judicial salaries have been surpassed in other areas as well. Many federal employees, including SEC trial attorneys, can now receive significantly more than the annual $165,000 salary for federal district court judges. Judicial law clerks who go on to associate positions at major law firms are able to command starting salaries in the same range or higher than their judges. And the judicial branch no longer enjoys an edge over the nation's top law schools when competing for the nation's brightest legal minds.

We are sensitive to the fact that judicial salaries are hardly meager by most standards and that federal judgeships remain prestigious. But this oversimplifies the reality of the problem and ignores the constitutional values at stake. For evidence that the inadequacy of judicial pay undermines life tenure, one need only point to the unprecedented number of departures from the federal bench in recent years. Such attrition cannot but diminish the quality, and ultimately, the independence of the judiciary.

We also are concerned about the detrimental effect of salary erosion on the diversity of the bench. As Senator Leahy recently stated, "Diversity on the bench helps ensure that the words 'equal justice under law,' inscribed in Vermont marble over the entrance to the Supreme Court, is a reality and that justice is rendered fairly and impartially."

As an association of lawyers who appear daily in our nation's federal courts, we know first-hand the importance of a highly qualified and independent judiciary. The fair administration of justice and the rule of law will suffer immeasurably if our nation's judiciary is not made up of a diverse group of our country's best lawyers. We urge you to guard against this consequence by passing a significant increase in judicial compensation this session of Congress.

Sincerely,



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JUDICIAL COMPENSATION:
OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Approved by the Board of Regents
March 2007

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JUDICIAL COMPENSATION: OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Executive Summary

No one can seriously dispute that an independent judiciary is critical to our system of government and to our way of life.[1] The Founding Fathers gave us a system of government with three distinct and independent branches, designed to serve as checks and balances against one another, to ensure our life, liberty, and pursuit of happiness. If our judiciary is to maintain its independence and serve its critical constitutional function, judges must be fairly compensated in order to attract and retain the very best candidates.

Sadly, we do not now compensate our judges adequately. Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%.[2] Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less than many law school professors and a fraction of what most could make in private practice. As a result, good judges are leaving the bench at an alarming rate. Judicial vacancies are increasingly being filled from a demographic that is not conducive to a diverse and impartial judiciary.

Chief Justice Roberts describes this state of affairs as nothing less than "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." The American College of Trial Lawyers joins Chief Justice Roberts – and countless others – in calling for a substantial increase in judicial compensation commensurate with the importance and stature the federal judiciary should and must have. And the College has a specific suggestion for the amount of the increase. We assume – we know – that our federal judiciary is no less important to our society than the judges of the country from which we adopted our legal system are to their native land. Judges in England are paid twice as much as their counterparts in the U.S. We believe that our federal judges ought to paid at least as much as English judges; so we propose a 100% raise from current compensation. At that, our judges will arguably still be underpaid for the service they provide our society, but it is a start.

We recognize that the increase we propose is a substantial sum of money But the cost is a mere 5% of the $6.5 billion federal court budget, and it is a rounding error – one hundredth of 1% – of the overall $2.9 trillion federal budget. It should be seen as a modest, sound investment in an independent judiciary; it is an investment necessary to preserve our constitutional framework.

---

1 "Judicial independence" is an oft misunderstood phrase. Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, explained that the term should not be interpreted to mean that a judge is free to do as he or she sees fit but rather that courts need to be fair and impartial, free from outside influence or political intimidation. Chief Justice Randall Shepard of the Indiana Supreme Court puts it thus: "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."

2 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

<u>An independent judiciary is critical to our society; and fair compensation is essential to maintaining that independence.</u>

Of all the grievances detailed in the Declaration of Independence, none was more galling than the lack of independence imposed by King George on Colonial judges:

> He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

Declaration of Independence, July 4, 1776. English judges were assured life tenure during their "good behavior" by the Act of Settlement of 1700, but their Colonial counterparts served at the pleasure of the King. Their salaries were subject to his whims. Judges beholden to the King, not surprisingly, often ruled as he pleased, no matter how unfairly. The framers of our post-Revolution government needed to ensure an independent judiciary.

In 1780, nearly a decade before the U.S. Constitution was ratified, John Adams drafted a Declaration of Rights for the Massachusetts State Constitution, which declared:

> It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The concept of judicial independence – that judges should decide cases, faithful to the law, without "fear or favor" and free from political or external pressures – remains one of the fundamental cornerstones of our political and legal system. As Alexander Hamilton explained, once the independence of judges is destroyed, "the Constitution is gone, it is a dead letter; it is a paper which the breath of faction in a moment may dissipate."[3]

Fair compensation is critical to maintain that independence. In the *Federalist Papers*, Hamilton explained the importance of fair compensation: "[I]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Federalist Papers* No. 79. Thus, the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) life tenure and (2) a prohibition against diminution of compensation.

Inflation is not unique to modern times. The drafters of the Constitution were aware of the problem, and they took steps to solve it. Explaining that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support," Hamilton, in *Federalist Paper No. 79*, observed:

> It would readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations

3 *Commercial Advertiser* (Feb. 26, 1802) (quoted by Chief Justice Roberts in his 2006 Year-End Report on the Federal Judiciary).

> in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

A case can be made that the Constitution *requires* a raise in judicial compensation to ameliorate the diminution which has occurred over time as the result of inflation.[4] When the Constitution was adopted, the Founding Fathers provided that the President was entitled to compensation which can be neither increased nor decreased during the term of office, while judges were guaranteed there would be no diminution of compensation; there was no ban on increases in judicial compensation, because it was contemplated that there might have to be increases. Hamilton explained:

> It will be observed that a difference has been made by the Convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

Id.

The prohibition against diminution of judicial salaries was not simply to protect judges; it was designed to protect the institution of an independent judiciary and thereby to protect all of us. Society at large is the primary beneficiary of a fairly compensated bench:

> [T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

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4 To be sure, in *Atkins v. United States*, 214 Ct. Cl. 186 (Ct. Cl. 1977), a group of federal judges were unsuccessful in arguing that their rights had been violated because Congress had raised other government salaries to adjust for inflation at a different rate than for judges. The court held that the Constitution vests in Congress discretion in making compensation decisions, so long as they are not intended as an attack on judicial independence. On the facts in *Atkins*, the court found no such attack. But the effect of inflation on judicial salaries over the past 30 years has eroded judicial compensation as effectively as an all-out assault. A court might well reach a different decision on today's facts.

Evans v. Gore, 253 U.S. 245, 253 (U.S. 1920).

The current levels of judicial compensation are not fair; and the inadequacy of those levels is having an adverse impact on the administration of justice in the federal courts.

In the period from 1969 through 2006, the average U.S. worker enjoyed an 18.5% increase in compensation adjusted for inflation; at the same time, the salaries of district court judges have decreased by 24.8%. Over the past 40 years, federal judges have lost 43.3% of their compensation as compared to the average U.S. worker.[5] In 1969, although federal judges earned less than they might in private practice, their salaries were consistent with and generally higher than those of law school deans and senior professors. But by 2007, law school deans and senior professors are, in general, earning twice what we pay our district court judges.[6]

Starting salaries for brand new law school graduates at top law firms now equal or exceed the salary of a federal judge. A judge's law clerks can out-earn their judge the day after leaving the clerkship.

No one can seriously argue that federal judges have not lost ground. At the same time, it must be conceded that a federal district judge's current salary – $165,200 – is a substantial sum to average Americans, the vast majority of whom earn substantially less. But the point is that judges are not supposed to be average. They should be the best of us, the brightest of us, the most fair and compassionate of us. The Founding Fathers knew and contemplated that good judges would be a rare commodity, entitled to the special emoluments of their stature:

> There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that ***there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.*** And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government

5 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

6 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary.*

> can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Federalist Papers, No. 78 (emphasis added).

The fact is that persons qualified to be federal judges can generally command far greater sums in the private sector and even in academia. So the issue is not whether current judicial salaries might seem adequate measured against the wages of a typical American; the issue is whether those salaries continue to attract and retain those relatively few, talented persons we need as judges. Our society cannot afford to have a federal judiciary overpopulated by persons who can afford to serve at vastly below-market rates only because their personal wealth makes them immune to salary concerns or because their personal abilities and qualifications do not command greater compensation.

During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the percentages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.[7] There is nothing wrong with having former prosecutors populate the bench. But too much of a good thing ceases to be a good thing. A bench heavily weighted with former prosecutors is one which may lose its appearance of impartiality and objectivity; and appearances aside, it may actually suffer that loss. It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench.

At the same time that current compensation levels place unacceptable barriers to attracting the best possible candidates for the bench, those levels are forcing sitting judges to rethink their commitments. Over the past several years, dozens of competent, able federal judges have left the bench, many of them making no secret of the financial pressures which led them to do so. In the past few years, at least 10 federal judges left the bench well before normal retirement age; combined, these 10 judges had 116 years left before they reached the age of 65.[8] The cost of losing these able jurists cannot be measured. Put aside the cost of finding their replacements – the cost of locating, screening, and vetting qualified applicants, the cost of training the new judges, the cost to the system as the remaining judges must shoulder the extra workload until a replacement is sworn in – all of these things have a cost to society, some measured in money, some measured in the time it takes for the wheels of justice to turn – but put all of that aside. The real cost is that those 10 judges we identify

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7 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary*, p. 3-4.

8 Judge David Levi has announced he will retire in July 2007; Judge Levi, who has served on the bench for 16 years, is 55. Judge Nora Manella resigned in March 2006 at age 55 after 8 years of service. Judge Michael Luttig retired in May 2006 at age 51 with 14 years of service. Judge Roderick McKelvie resigned in June 2002 at age 56 with 10 years of service. Judge Sven Erik Holmes resigned in March 2005 at age 54 with 10 years of service. Judge Carlos Moreno resigned in October 2001 at age 53 with 3 years of service. Judge Stephen Orlofsky resigned in 2001 at age 59 after 7 years of service. Judge Michael Burrage resigned in March 2001 at age 50 with 6 years of service. Judge Barbara Caufield resigned in September 1994 at age 46 with 3 years of service. Judge Kenneth Conboy resigned in December 1993 at age 55 with 6 years of service. Over the past two decades, scores of other judges have left the bench while still in their prime to pursue more financially rewarding careers.

above, (and scores of others like them) had more than 100 years of prospective judicial experience now forever lost to our society; years they chose to expend in private rather than public pursuits.[9] The loss is incalculable.

A federal judgeship was once seen as the capstone of a long and successful career; seasoned practitioners with years of experience and accomplishment accepted appointments to the bench, knowing that they would make some financial sacrifice to do so, but counting on the sacrifice not being prohibitive. Now, sadly, the federal bench is more and more seen, not as a capstone, but as a stepping stone, a short-term commitment, following which the judge can reenter private life and more attractive compensation. As a long-term career, the federal bench is less attractive today for a successful lawyer in private practice than it is for a monkish scholar or an ideologue. Ann Althouse, *An Awkward Plea, N.Y.Times* Feb. 17, 2007 at A15, col. 1

Chief Justice Roberts is not alone in decrying the current situation. Former Federal Reserve Board Chairman Paul Volcker, as Chair of the National Commission on the Public Service, reported in January 2003 that "lagging judicial salaries have gone on too long, and the potential for the diminished quality in American jurisprudence is now much too large." The Volcker Commission pointed to judicial pay as "the most egregious example of the failure of federal compensation policies" and recommended that Congress should make it a "first priority" to enact an immediate and substantial increase in judicial salaries. Congress, of course, has yet to do so. In February 2007, Mr. Volcker published an opinion piece in the *Wall Street Journal* in which he noted that sad fact. Mr. Volcker, observing that federal judges must possess rare qualities of intellect and integrity, stated that "the authors of the Constitution took care to protect those qualities by providing a reasonable assurance of financial security for our federal judges. Plainly, the time has come to . . . honor the constitutional intent."

The current system of linking judicial salaries to Congressional salaries makes little sense. If federal judicial salaries are to be linked to a benchmark, it should be to the salaries of their counterparts in other countries.

Since the adoption of the *Ethics Reform Act of 1989*, judicial salaries have been linked to Congressional and Executive Branch salaries. Whatever the reasoning that led to that linkage, it is a tie which must now be broken. Certainly, there is no constitutional basis for such a linkage. Judges and members of Congress are equally important to our system of government, but it was never contemplated that judges and Congressmen be equated. The Constitution contemplated that Congress would be composed of citizen-statesmen, who would lend their insights and talents to government for limited periods of time and return to the private sector. Judges in contrast, were and still are expected to serve for life.

But even if it were entirely fair to equate the roles of members of Congress and members of the bench, the linkage would still be unfair to the judiciary. Members of Congress are also underpaid. But members of Congress are limited in their ability to vote themselves a salary increase for the very

9 We use 65 as the normal retirement age, but, of course, federal judges seldom retire at that age; most remain active far longer and take senior status to remain on the bench and contribute for many additional years.

reason that they are the ones who make the decisions. Congress must be appropriately concerned about awarding itself a raise no matter how well deserved because of the appearance of self-interest and the political impact of that appearance. But there is no appearance of impropriety in awarding a well-deserved increase to judges who have no say in the matter.[10]

Because of linkage, political considerations, which necessarily impact decisions about congressional compensation, adversely and unfairly affect judicial compensation. Political considerations should not dictate how we pay our judges. Indeed, we believe that the Constitution was designed to immunize that issue from political pressure.

The federal government already pays myriad individuals far more than current congressional salaries, in recognition that market forces require greater compensation. An SEC trial attorney or FDIC regional counsel can make $175,000 per year.[11] An SEC supervisory attorney can make over $185,000 per year. A CFTC deputy general counsel can make nearly $210,000 per year. The chief hearing officer at the FDIC can make in excess of $250,000 per year; the managing director of the OTS can make in excess of $300,000 per year.[12] The OCC compensates its employees in nine pay bands, a full third of which include salaries with possible maximums in excess of $183,000.[13]

A February 2007 search of the government website posting open positions as of that date returned 343 available jobs with possible salaries in excess of a federal judge's salary; 208 of those postings have salaries in excess of $200,000, 48 in excess of $250,000.

Interestingly, the two countries with legal and constitutional systems most closely analogous to ours, Canada and England, have no links between judicial and legislative salaries; both countries pay their judges at different (higher) rates than other government officials – and both countries pay their judges significantly more than we do. The Canadian counterparts to our Supreme Court justices and federal judges receive salaries approximately 20% greater than U.S. judges:

U.S.	Salary	Canada[14]	Can $	Rate	U.S. $
Chief Justice	$ 212,100.00	Chief Justice	297,100.00	0.863	256,397.30
Appellate Judges	$ 175,100.00	Puisne Judges	275,000.00	0.863	237,325.00
District Judges	$ 165,200.00	Federal Judges	231,100.00	0.863	199,439.30

10 The Constitution left Congress free to vote itself a raise or a salary cut. Almost immediately, at least one of the Founding Fathers thought better of that, and the "Madison Amendment" was proposed in 1789, along with other amendments which became the Bill of Rights. The Madison Amendment would have allowed Congress to increase congressional salaries, but no increase could take effect until an intervening election which would allow the voters an opportunity to express their displeasure with such a move. But while the Bill of Rights amendments sailed through the original 13 states, it took more than 200 years to obtain the necessary percentage of states to ratify the Madison amendment; it finally became the 27th Amendment in 1992 when Alabama became the 38th state to ratify.

11 For those not conversant with government acronyms: SEC is the Securities & Exchange Commission; FDIC is the Federal Deposit Insurance Corporation; CFTC is the Commodities Futures Trading Commission; OTS is the Office of Thrift Supervision; OCC is the Office of the Comptroller of the Currency.

12 Facts assembled by the Administrative Office of the Courts, February 8, 2007.

13 OCC Pay band VII has salaries ranging from $98,300-$183,000; pay band VIII ranges from $125,600-$229,700; pay band IX ranges from $163,100-$252,700. See www.occ.treas.gov/jobs/salaries.htm.

14 Data provided by Raynold Langois, FACTI., Langlois Kronström Desjardins, Avocats, Montréal (Québec).

In England, a Member of Parliament earns 60,277 Pounds – approximately $120,000. A High Court judge, the equivalent of a federal district court judge, is paid 162,000 Pounds, approximately $318,000. English judges make nearly twice what their American counterparts earn:

U.S.	Salary	England[15]	£	Rate	U.S. $
Chief Justice	$212,100.00	Lord Chief Justice	225,000.00	1.964	$ 441,900.00
Appellate Judges	$175,100.00	Lords of Appeal	194,000.00	1.964	$ 381,016.00
District Judges	$165,200.00	High Court	162,000.00	1.964	$ 318,168.00

It is ironic – our forebears split from England and formed our great, constitutional democracy in no small part because of the manner in which King George exerted influence over colonial judges by controlling their compensation; Now, two centuries later, England has provided sufficient judicial compensation to assure the recruitment, retention, and independence of good judges, while we pay our judges less than we do numerous mid-level government employees and recent law school graduates. Our Founding Fathers would find this state of affairs unacceptable. Our judges are at least as valuable to our society as English judges are to theirs. And our judges should be paid accordingly.

A 100% salary increase will still leave our federal judges significantly short of what they could earn in the private sector or even in academia. But such an increase will at least pay them the respect they deserve and help to isolate them from the financial pressures that threaten their independence.

The College is not the first and undoubtedly will not be the last to advocate for a substantial raise for our judiciary. In addition to Chief Justice Roberts and former Fed Chairman Volcker, we join the American Bar Association, which has adopted a resolution in support of increased compensation. We join countless other state and local bar associations who have done likewise. We join the General Counsels of more than 50 of the nation's largest corporations who wrote to members of Congress on February 15, 2007 urging a substantial increase. We join the deans of more than 125 of the nation's top law schools who made a similar appeal to congressional leadership in letters dated February 14, 2007. We join the editorial staffs of numerous publications, including the *New York Times*, the *Detroit Free Press*, the *Albany Times Union*, the *Chattanooga Times Free Press*, the *Seattle Post-Intelligencer*, the *Orlando Sentinel*, the *Pasadena Star-News*, the St. *Petersburg Times*, the *Anchorage Daily News*, the *Akron Beacon Journal*, the *New Jersey Star Ledger*, the *Raleigh-Durham News*, the *Boston Herald* and the *Scripps Howard News Service*, all of which have advocated for salary increases. And we join the signers of our Declaration of Independence in recognizing the need to unlink judicial pay from political considerations. We are not sure we can say it any better than the editors of the *Chattanooga Times*:

> All Americans, of course, should want our judges to be among the most stable of our nation's lawyers, to be well-trained men and women of integrity, dedicated to absolute impartiality in upholding the Constitution and the law – with no political or philosophical agenda for "judicial activism."
>
> And we should pay enough to justify the best.

15 Data obtained from Department for Constitutional Affairs; see www.dca.gov.uk.

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April 19, 2007

Re: The Need for a Substantial Increase for Federal Judicial Salaries

Dear Honorable Sirs:

We write in support of Chief Justice John Roberts' call for a substantial increase in salaries for the federal judiciary. As Chief Justice Roberts pointed out in his 2006 year-end report, the average U.S. worker's wages rose 17.8% since 1969, but the compensation of federal judges actually declined 23.9% after inflation over the same period. Today, whether compared to law school deans, senior professors, leaders in the nonprofit sector, private practioners or recent law school graduates in many markets, judicial salaries lag far behind the salaries of these other groups. Thus, we agree with the Volcker Commission's observation that "judicial salaries are the most egregious example of the failure of federal compensation policies."

Often forgotten in the debate is that a large number of federal employees, in legal and non-legal positions, currently receive salaries that exceed the salary of district court judges. Not only have annual cost-of-living increases been denied to the federal judiciary but it has been sixteen years since the last raise in judicial pay. We recognize that there will always be a significant disparity in the pay of those in the private sector and those performing public service. Nonetheless, there is no basis for treating members of the federal judiciary different from other federal employees. We understand that the salaries of the federal judiciary and Congress are linked by law, but congressional and judicial salaries need to be decoupled, or at least set off in time.

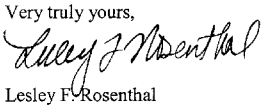
The crisis that exists because of the inadequacy of federal judicial pay is real and requires immediate attention. The decline in pay discourages highly qualified private sector lawyers from entering the judiciary and caused good, experienced judges to leave the bench.

This Section of the New York State Bar Association includes 2,200 leading commercial litigators involved in the representation of commercial clients in major matters in federal courts throughout the United States. Thus, we are keenly interested in the federal judiciary's decision-making continuing to be well-reasoned and timely. The United States is a model of free market enterprise, in part, because of the guidance provided by the federal judiciary on a wide range of commercial disputes.

Preserving the quality and independence of the judiciary also is critical to our constitutional form of government. Our Country needs and deserves the most qualified people to serve as federal judges. To attract and retain a high-quality judiciary selected from a diverse pool of private and public sector candidates, judicial salaries need to be increased substantially now.

We hope you will quickly enact a significant increase in federal judicial salaries.

Very truly yours,



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